Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

RHETTA B. SWEENEY,
Individually and as Trustee of the
MAPLE LEAF TRUST and of the
CANADIAN REALTY TRUST, and JOHN SWEENEY,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
in its capacity as Receiver of
COMFED SAVINGS BANK,
COMFED MORTGAGE COMPANY, INC.,
COMFED ADVISORY COMPANY, INC.,
and DENNIS FUREY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *D'Oench, Duhme* doctrine or its related codifications bar a claim under state law for deceptive acts and practices against a failed savings and loan bank to which the Resolution Trust Corporation has succeeded as receiver or conservator where the claim seeks neither to enforce nor set aside any agreement with the bank?

2. Does the *D'Oench, Duhme* doctrine or its related codifications bar claims against subsidiaries of a failed savings and loan bank when the RTC has been appointed conservator or receiver of the bank but has not been appointed conservator or receiver of the subsidiaries, has not been substituted as a party defendant for the subsidiaries and has denied that it is successor in interest to the subsidiaries?

3. Does the Financial Institution Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1441a(l)(3), as applicable in January 1991, allow for removal of an action by the RTC, in its capacity as receiver, to the district court with jurisdiction over the place where the state action is pending instead of to the United States District Court for the District of Columbia?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. There Is A Conflict In The Circuits As To The Applicability Of *D'Oench, Duhme* To Tort Claims	7
II. The Application Of *D'Oench, Duhme* To Entities Other Than Those To Which The RTC Has Actually Succeeded Raises An Issue Of National Importance	16
III. There Is A Conflict In The Circuits As To The Meaning Of FIRREA's Removal Provision	17
CONCLUSION	21
APPENDIX	
A. Opinion of the United States Court of Appeals for the First Circuit, dated January 31, 1994	
B. Memorandum and Order of the United States District Court for the District of Massachusetts, dated April 14, 1992	
C. Memorandum and Order for the United States District Court for the District of Massachusetts, dated June 7, 1991	

D. Judgment of the United States Court of Appeals for the First Circuit, entered January 31, 1994

E. Order of the United States Court of Appeals for the First Circuit, denying en banc reconsideration, dated March 17, 1994

F. Verified Complaint (without exhibits), dated April 14, 1989

G. Order of Appointment of Resolution Trust Corporation as conservator of ComFed Savings Bank, dated December 13, 1990

H. Motion for Substitution, dated January 7, 1991, and Orders of the Middlesex Superior Court, dated January 11, 1991 and January 15, 1991

I. Notice of Removal, dated January 11, 1991

J. Judgment of the United States District Court for the District of Massachusetts, dated April 30, 1992, and Order, dated February 2, 1993

K. Proposed Congressional Legislation and Excerpts from Congressional Record, dated November 11, 1993

L. Answer to Complaint, *O'Brien v. ComFed Savings Bank*, dated May 16, 1991

TABLE OF AUTHORITIES

Cases	Page(s)
Astrup v. Midwest Federal Savings Bank, 886 F.2d 1057 (8th Cir. 1989)	11
Beighley v. FDIC, 868 F.2d 776 (5th Cir. 1989)	14
Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988)	19
Commerce Federal Sav. Bank v. FDIC, 872 F.2d 1240 (6th Cir. 1989)	13
D'Oench, Duhme & Company, Inc. v. FDIC, 315 U.S. 447 (1942)	*passim*
Federal Savings & Loan Ins. Corp. v. Two Rivers Assoc., Inc., 880 F.2d 1267 (11th Cir. 1989)	14
Garrett v. Commonwealth Mortgage Corp. of America, 938 F.2d 591 (5th Cir. 1991)	12
Grubb v. FDIC, 868 F.2d 1151 (10th Cir. 1989)	11
Hanson v. FDIC, 13 F.3d 1247 (8th Cir. 1994)	13
Hellon & Assoc., Inc. v. Phoenix Resort Corp., 958 F.2d 295(9th Cir. 1992)	18
In re NBW Commercial Paper Litigation, 826 F. Supp. 1448(D.D.C. 1992)	15, 19
Jones v. RTC, 7 F.3d 1006 (11th Cir. 1993), *vacated on petition for rehearing en banc*, ___ F3d. ___, 1994 WL 123763 (11th Cir. April 12, 1994)	13

Page(s)

Kilpatrick v. Riddle, 907 F.2d 1523 (5th Cir. 1990), *cert. denied, Rogers v. FDIC*, 498 U.S. 1083 (1991) 14

Langley v. FDIC, 484 U.S. 86 (1987) 14-15

OPS Shopping Ctr., Inc. v. FDIC, 992 F.2d 306 (11th Cir. 1993) 13

Patterson v. FDIC, 918 F.2d 540 (5th Cir. 1990) 14

RTC v. Lightfoot, 938 F.2d 65 (7th Cir. 1991) 18

RTC v. Nernberg, 3 F.3d 62 (3d Cir. 1993) 18

RTC v. Westgage Partners Ltd., 937 F.2d 526 (10th Cir. 1991) 18

Timberland Design, Inc. v. First Service Bank for Savings, 931 F.2d 46 (1st. Cir. 1991) *14*

Vernon v. FDIC, 981 F.2d 1230 (11th Cir. 1993), *rehearing denied*, 990 F.2d 1270 (1993) . . . 13

Vernon v. RTC, 907 F.2d 1101 (11th Cir. 1990) . . 13

Victor Hotel Corp. v. FCA Mortgage Corp., 928 F.2d 1077 (11th Cir. 1991) 17

Statutes

12 U.S.C. § 1441a(b)(4) 8

12 U.S.C. § 1441a(l)(3) 3, 18

12 U.S.C. § 1821(d)(9)(A) 3, 8, 15

12 U.S.C. § 1823(e) . . . . . 2, *passim*

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1441(a) 18-19

28 U.S.C. § 1446(a) 20

28 U.S.C. § 1447(c) 18-20
Fed. R. Civ. P. 63 6-7
Mass. Gen. L. c. 93A § 2 . . . . . 4, 9

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Rhetta B. Sweeney, individually and as trustee of the Maple Leaf Trust and of the Canadian Realty Trust, and John Sweeney (the "Sweeneys") hereby petition for a writ of certiorari and ask this Court to vacate the judgment below and remand this case for reconsideration.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, dated January 31, 1994 (A1), is reported at 16 F.3d 1. The memorandum and order of the United States District Court for the District of Massachusetts, dated April 14, 1992, entering judgment for the respondents (B1), is not officially reported. The memorandum and order of the district court dated June 7, 1991, denying petitioners' motion for remand (C1), is reported at 765 F. Supp. 33.

JURISDICTION

The judgment of the Court of Appeals (D1) was entered on January 31, 1994. A timely petition for *en banc* reconsideration was denied by the Court of Appeals by Order dated March 17, 1994 (E1). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

12 U.S.C. § 1823(e) provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which

approval shall be reflected in the minutes of said board or committee, and

(4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1821(d)(9)(A) provides:

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against a receiver or the Corporation.

12 U.S.C. § 1441a(l)(3)(A), as effective until February 1, 1992, provided, in relevant part:

The Corporation may, without bond or security, remove any action, suit or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal place of business is located.

12 U.S.C. § 1441a(l)(3)(A), as amended, effective February 1, 1992, provides, in relevant part:

The Corporation, in any capacity and without bond or security, may remove any action, suit or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the Corporation has been appointed conserva-

tor or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution.

Mass. Gen L. c. 93A§ 2 provides:

Unfair practices; legislative intent; rules and regulations

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is intent of the legislature that in construing paragraph (a) of this section in actions brought under sections 4, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal trade Commission Act (15 U.S.C.45(a)(1), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45 (a)(1) (The Federal trade Commission Act), as from time to time amended.

STATEMENT OF THE CASE

In August 1987, the Sweeneys borrowed $1,600,000 from the ComFed Savings Bank ("ComFed"). The loan was secured by two mortgages on two parcels of land in Hamilton, Massachusetts owned by the Sweeneys. The purpose of the loan was to discharge certain pre-existing debt and finance the work required for subdivision approval of the property from the Town

of Hamilton, which approval was obtained in February 1988. (F2).

In August 1988, the Sweeneys' loan with ComFed came due. The Sweeneys defaulted, and in November 1988 ComFed initiated foreclosure proceedings (A2).

In April 1989, the Sweeneys filed a nine-count complaint in Middlesex Superior Court in Massachusetts asserting various claims against ComFed, as well as its subsidiaries ComFed Mortgage Company, Inc. ("ComFed Mortgage") and ComFed Advisory Company, Inc. ("ComFed Advisory") and Dennis Furey ("Furey"), an employee of ComFed Mortgage. The complaint (F1, excluding exhibits) included claims for breach of contract in connection with the loan, specific performance of an alleged partial release by ComFed, fraud in the inducement, breach of fiduciary duty, interference with advantageous business relations and intentional infliction of emotional distress. There was also a claim against all of the ComFed defendants (Count VIII) (F42) for violation of Mass. Gen. L. c. 93A § 2, which protects against "unfair or deceptive acts or practices in the conduct of any trade or commerce." *See supra*, at 4. ComFed filed a counterclaim for declaratory relief, seeking a determination of the Sweeneys' liability under the loan (A2).

On March 19, 1990, a jury convened by the Massachusetts state court found for ComFed on its counterclaim and awarded ComFed $2,069,580.33. (A2). The jury also found for ComFed on all of the Sweeneys' claims, with the exception of the claim for emotional distress, as to which the jury awarded petitioner Rhetta Sweeney the amount of $65,000, and the claims for specific performance and violation of the Massachusetts statute, which the trial judge was bound to reserve for her own determination (A3).

On December 13, 1990, the RTC was appointed conservator of ComFed (G1). On January 10, 1991, the RTC moved, in the Middlesex Superior Court, for an order

substituting the RTC in the Sweeneys' action in place of defendants ComFed, ComFed Mortgage and ComFed Advisory, which substitution that court ultimately allowed, on January 15, 1991, as to ComFed only (H2). On January 11, 1991, before the state judge made her determinations on the non-jury claims and before any judgment was entered in the state court on the jury verdict, the RTC removed the case to the United States District Court for the District of Massachusetts (I1).

On January 30, 1991, the state court judge, evidently unaware of the removal, purported to find for the Sweeneys on their claim for deceptive practices under the Massachusetts statute, awarding them over $3 million in damages and attorneys' fees (A3). The opinion of the state court judge was released to the Sweeneys on February 25, 1991 (A3). On March 1, 1991, the Sweeneys moved to remand, which motion was denied as untimely by Order dated June 7, 1991 (C1).

Thereafter, by memorandum and order dated April 14, 1992 (B1), the United States District Court for the District of Massachusetts (i) granted the RTC's motion to enter judgment in accordance with the special verdict returned by the state court jury on the claims and counterclaim submitted to it and (ii) granted the RTC's motion for summary judgment dismissing as against all defendants the Sweeneys' claim for specific performance and their claim for deceptive practices under the Massachusetts statute (B6-7). In so doing, the district court determined that the jury's verdict could be entered without a new trial, pursuant to Fed. R. Civ. P. 63 (B4), that the state court judge was without authority, by reason of the removal, to enter judgment with respect to the non-jury counts (B4), and that the RTC (on behalf of ComFed and its subsidiaries) was entitled to summary judgment on the non-jury counts, including the statutory claim for deceptive practices, under the doctrine of *D'Oench, Duhme & Company, Inc. v. FDIC*, 315 U.S. 447

(1942), and the provisions of 12 U.S.C. § 1823(e) (B4-6). Final judgment was entered on February 9, 1993 (J1-3).

The United States Court of Appeals for the First Circuit affirmed. As to the Sweeneys' motion for remand, the Court of Appeals found it unnecessary to reach the issue of timeliness underlying the district court's decision (A5), because the Court found that removal to the district court for Massachusetts, rather than the District of Columbia, was permissible under 28 U.S.C. § 1441(a), even if impermissible under the removal provision of FIRREA, 12 U.S.C. § 1441a(l)(3), as it existed in January 1991 (A5-6). As to the district court's adoption of the state jury verdict under Rule 63, the Court of Appeals found no prejudice to the Sweeneys (without expressly addressing the applicability of Rule 63 to removal cases) (A9-10). As to the district court's dismissal of the Massachusetts statutory claim, the Court of Appeals agreed with the district court that the claim was barred (as to all ComFed defendants) by the *D'Oench, Duhme* doctrine (as well as by § 1823(e)), which it determined "bars affirmative claims [against the RTC], whether sounding in contract or tort, when they are premised on an unwritten agreement" (A7).

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict In The Circuits As To The Applicability Of *D'Oench, Duhme* To Tort Claims

In applying the *D'Oench, Duhme* doctrine to the Sweeneys' claim for deceptive practices, the United States Court of Appeals for the First Circuit misconstrued the decision of this Court which gave birth to the doctrine and rendered an expansive interpretation in conflict with the law of several other circuits.

In *D'Oench, Duhme & Company, Inc. v. FDIC*, 315 U.S. 447 (1942), this Court considered whether a borrower from a failed bank could assert as an affirmative defense to an action

on a note, brought by the FDIC as successor in interest to the bank, a side agreement between the borrower and the bank to the effect that the note would not be called for payment. The Court determined that such side agreements (whether oral or evidenced by an informal writing) could not be raised as a defense to payment on such a note, because to do so would undermine the "federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans." *Id.* at 456. The Court found its ruling necessary to enable the FDIC to correctly ascertain the assets held by an insured bank and to discourage borrowers and banks from engaging in any "scheme or arrangement whereby the banking authority ... was likely to be misled." *Id.* at 460.

In 1950, Congress codified what became known as the *D'Oench, Duhme* doctrine in an amendment to the Federal Deposit Insurance Act, 12 U.S.C. § 1823(e), *supra* at 2, which provides, in relevant part, that "no agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it ... shall be valid against the Corporation unless such agreement is in writing" and meets certain other formalities. In 1989, Congress enacted FIRREA, which extended the protections of § 1823(e) to the RTC, 12 U.S.C. § 1441a(b)(4), and included its own *D'Oench, Duhme* provision in § 1821(d)(9)(A), *supra* at 3, which states that "any agreement which does not meet the requirements set forth in § 1823(e) ... shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation." By this legislation, Congress confirmed that the type of side agreements addressed in *D'Oench, Duhme* would not be enforceable, either as a defense to a claim by the FDIC or RTC or as the basis for a claim against them.

However, it is clear from the foregoing that neither this Court's decision in *D'Oench, Duhme* nor the subsequent legislation was addressed to claims which do not turn on the validity of any agreement with the insured depository institution but rather allege other wrongful conduct by it. This is such a case.

Count VIII of the Sweeneys' complaint (F42) alleges that various actions of ComFed and its subsidiaries constituted unfair and deceptive trade practices under Mass. Gen. L. c. 93A § 2(a). Among the allegations in support of this claim are that (i) ComFed's property appraisals (reflected in the loan documents) were purposefully inflated so as to assure the approval of mortgage-secured loans such as that to the Sweeneys which could not be supported by the true value of the mortgaged property (F7 ¶ 19, F9 ¶ 32); (ii) ComFed's "false appraisal practices" misled the Sweeneys as to the viability of their proposed development, causing them to incur not only debt to the bank but substantial development costs (F12-13 ¶¶ 43, 48, F16 ¶ 61); (iii) ComFed exceeded the applicable maximum loan-to-value ratio of 75% prescribed by its Board of Directors, in violation of 12 C.F.R. § 545.32 (F9 ¶ 30); (iv) ComFed, in granting the Sweeneys a loan, purposefully ignored their inability to satisfy the loan (F15 ¶ 56); (v) ComFed falsely represented to the Sweeneys, both orally and in commitment letters, that ComFed would finance the development of their property with additional funding, without which assurance the Sweeneys would not have taken out their loan and would not have incurred substantial development costs (F9 ¶ 29, F12-13 ¶¶ 44-45, F15-17 ¶¶ 58-65, F25-32 ¶¶ 116-41); (vi) ComFed failed to provide the Sweeneys any of the loan documents for their review prior to the closing (F10 ¶ 35); (vii) ComFed made false written statements about its dealings with the Sweeneys (F17 ¶ 65); (viii) ComFed misapplied the funds in the Sweeneys' Interest Escrow Account (F18-20 ¶¶ 72-88); (ix) ComFed violated its disbursement procedures and ruined

the Sweeneys' credit standing by failing to cover various expenses of the Sweeneys and failing to inform them of that fact (F21-23 ¶¶ 91-104); and (x) ComFed prematurely and erroneously gave notice of default on the Sweeneys' loan (F24 ¶¶ 105-06).

As shown by the foregoing, the Sweeneys' claim did not call for any finding that there was any agreement, written or otherwise, between the Sweeneys and ComFed or any other institution to which the RTC had succeeded. It did not ask the court to enforce any side agreement modifying the terms of their loan or to excuse their default thereunder by reason of any such agreement. It did not ask the court to enforce any promise of further funding. It called only for a determination (which the state court judge belatedly made) that ComFed and/or its subsidiaries had violated the Massachusetts statute by reason of various actions and representations, both written and oral, which constituted deceptive practices and entitled the Sweeneys to damages, separate and apart from any contractual obligation the Sweeneys had to ComFed or ComFed may have had to the Sweeneys. *D'Oench, Duhme* and the related legislation are therefore inapplicable.

Nevertheless, the Court of Appeals treated Count VIII as if it were a claim for breach of contract instead of tortious conduct. It found the facts insufficient "to establish an agreement to fund further construction" and "insufficient to establish an obligation on the part of ComFed which would meet the requirements of *D'Oench, Duhme*" (A8). The Court failed to recognize that the Sweeneys' claim did not turn on the finding of any such agreement or obligation on the part of ComFed and that *D'Oench, Duhme* therefore did not apply.

In so doing, the Court of Appeals not only misconstrued the Sweeneys' claim but fundamentally misconstrued *D'Oench, Duhme*. The Court was guided by the mistaken view that in order "to satisfy the structures of *D'Oench* and § 1823(e), [the

Sweeneys] must show an agreement in writing to provide the additional loans" (A7). However, that is the case only if their claim depends upon the existence of an agreement. *D'Oench, Duhme* requires that *if* a claim against the FDIC (or RTC) is based on an agreement or arrangement with the failed bank, it must be recorded in the bank's records; it does not mean, as the Court of Appeals apparently concluded here, that one cannot bring a claim (or, as here, continue a claim) against the FDIC or RTC *unless* it is based on such a recorded agreement.[1]

This critical distinction, though ignored by the Court of Appeals for the First Circuit, has been expressly recognized by the courts of appeals in several other circuits. In *Astrup v. Midwest Federal Savings Bank*, 886 F.2d 1057 (8th Cir. 1989), the United States Court of Appeals for the Eighth Circuit sustained a claim for breach of fiduciary duty arising out of the failure of a subsidiary of a failed bank to provide additional funding. The Court stated (at 1059) as follows:

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[1] In fact, the Sweeneys' claim for deceptive practices is based in part on a fully recorded agreement (*i.e.*, the same loan documents on which ComFed initiated and the RTC pursued foreclosure proceedings), in that, for example, ComFed's violation of its own lending limits is evident from the face of the loan documents themselves. The claim is also based in part on commitment *letters* from the defendants representing that additional funding would be extended. Thus, even insofar as the Sweeneys do assert an agreement with or representations by the defendants as part of their claim for deceptive practices, the agreement and representations were in writing, thereby satisfying *D'Oench*. *D'Oench* is intended to prevent concealment of a bank's true financial condition through "secret agreements," but here bank examiners could determine from the face of the bank's documents that there might be a violation of law for which ComFed, or the RTC as its successor, could be liable. And, of course, this was even more evident as of the day the RTC was appointed conservator, inasmuch as the Sweeneys' claim for deceptive practices had already been filed and tried. *See Grubb v. FDIC*, 868 F.2d 1151, 1159 (10th Cir. 1989) (FDIC cannot be misled, and *D'Oench* therefore is inapplicable, where borrower and failed bank had already litigated their claims to judgment before the bank failed.)

> Breach of such a duty sounds in tort rather than contract, and the District Judge rightly held that it would be an extension of *D'Oench, Duhme* to apply it to a tort claim. The *D'Oench, Duhme* doctrine simply forbids fabrication of fictitious assets for inclusion on the accounts receivable portfolio of regulated financial institutions tending to mislead and deceive bank examiners in their investigations to determine the financial condition of such institutions. That doctrine affords no protection against tort claims against a financial institution ....

The United States Court of Appeals for the Fifth Circuit has similarly found *D'Oench* inapplicable to cases such as this. In *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591 (5th Cir. 1991), plaintiffs borrowed money from a subsidiary of an insured depository and thereafter brought claims against it for breach of fiduciary duty, negligence and violations of the Texas Deceptive Trade Practices Consumer Protection Act. The RTC was then appointed receiver of the failed parent bank and, as here, removed the case to federal court and sought dismissal under *D'Oench*. The Court of Appeals reversed the dismissal granted by the district court and held (at 594):

> ... the [*D'Oench, Duhme*] doctrine justifies dismissal only if the complaint alleges a secret agreement or if the complaint shows that the plaintiffs lent themselves to a scheme likely to mislead banking authorities....
>
> The [plaintiffs'] complaint neither alleges a secret agreement nor suggests any participation by the [plaintiffs] in a scheme likely to mislead authorities. Instead, it asserts claims for breach of contract, breach of fiduciary duty, and negligence. The FDIC argues that the [plaintiffs'] claim must be based on some unwritten agreement. We disagree. Neither breach

> of fiduciary duty nor negligence necessarily depends on an agreement between the parties.
>
> The FDIC is correct that if a claim is based on an agreement, that agreement must meet the requirements of section 1823(e). But neither section 1823(e) nor the *D'Oench, Duhme* doctrine prevents plaintiffs from asserting affirmative claims or defenses that do not depend on agreements. *See Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 93-94, 108 S. Ct. 396, 402, 98 L.Ed.2d 340 (1987) ....

See also *Hanson v. FDIC*, 13 F.3d 1247, 1251 (8th Cir. 1994) (Section 1823(e) "protects the FDIC from claims *based upon agreements* which decrease the FDIC's interest in an asset ... When determining whether the statute bars a claim, a court must first determine whether the wrongdoings underlying the claim are based upon the agreement") (emphasis in original).

The United States Court of Appeals for the Eleventh Circuit has also held that the *D'Oench, Duhme* doctrine does not apply to tort claims that do not turn on the enforceability of an oral agreement with the failed bank. *Vernon v. FDIC*, 981 F.2d 1230, 1233 (11th Cir. 1993), *rehearing denied*, 990 F.2d 1270 (1993); *Vernon v. RTC*, 907 F.2d 1101 (11th Cir. 1990); *OPS Shopping Ctr., Inc. v. FDIC*, 992 F.2d 306, 310 (11th Cir. 1993); *see also Jones v. RTC*, 7 F.3d 1006 (11th Cir. 1993), *vacated on petition for rehearing en banc*, ___ F.3d___, 1994 WL 123763 (11th Cir. April 12, 1994).

Thus, there is a clear conflict between the viewpoint of the First Circuit on *D'Oench* and the prevailing law in the Fifth, Eighth and Eleventh Circuits.[2] *See also Commerce Federal Sav. Bank v. FDIC*, 872 F.2d 1240, 1244 (6th Cir. 1989).

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[2] In its decision here, the Court of Appeals failed to acknowledge *Astrup, Garrett* or *Vernon*. Rather, the Court relied (A7-8) on previous First Circuit authority and other decisions from the Fifth Circuit and the Eleventh Circuit

The differing views in the circuits as to the breadth of *D'Oench* may be attributable to the fact that since *D'Oench* and the enactment of § 1823(e) this Court has had occasion to consider this area of law only once. In *Langley v. FDIC*, 484 U.S. 86 (1987), the Court held that § 1823(e) barred an affirmative defense of fraudulent inducement in a claim by the FDIC for nonpayment on a note. The Court reasoned that a condition to payment of a note (such as the truthfulness of certain warranties) is necessarily part of the "agreement" on the note and that the requirements of § 1823(e) therefore attach to any assertion of such condition as an excuse for nonpayment.

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to support its view that *D'Oench* applies even to tort claims such as the Sweeneys'. These cases, however, are inapposite. In *Timberland Design, Inc. v. First Service Bank for Savings*, 932 F.2d 46, 50 (1st Cir. 1991), the court held that *D'Oench* "bars defenses and affirmative claims, whether cloaked in terms of contract or tort, as long as those claims arise out of an alleged secret agreement." As shown above however, the Sweeneys' claim does not arise out of any such agreement. Likewise, the Fifth Circuit case cited by the Court of Appeals, *Beighley v. FDIC*, 868 F.2d 776, 783 (5th Cir. 1989), applies *D'Oench* to claims for tort "arising from [the failed bank's] alleged breach of an unwritten agreement." *See also Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir. 1990), *cert. denied, Rogers v. FDIC*, 498 U.S. 1083 (1991). Again, however, the Sweeneys' claim does not arise from any breach of an unwritten agreement with the bank but rather from an allegedly unfair and deceptive course of conduct by the bank. In such cases, *Garrett, supra*, decided after *Beighley*, clarifies the law in the Fifth Circuit as to the inapplicability of *D'Oench*. *See also Patterson v. FDIC*, 918 F.2d 540, 543 (5th Cir. 1990) (homestead claims under Texas state law not barred by *D'Oench* because they exist independent of any agreement). The Eleventh Circuit case cited by the Court of Appeals, *Federal Savings & Loan Ins. Corp. v. Two Rivers Assoc., Inc.*, 880 F.2d 1267, 1276 (11th Cir. 1989), does not even address tort claims but rather merely confirms that a supposed "agreement" with a failed bank is not enforceable if it does not actually evidence an "obligation" rather than a mere "intention" on the part of the failed bank. The *Vernon* and *OPS* decisions shave since made plain that the law in the Eleventh Circuit differs from the First Circuit as to the applicability of D'Oench to tort claims.

However, *Langley* did not by any means determine that tort claims generally, or fraud claims in particular, are barred by *D'Oench* or § 1823(e), only that such allegations could not be invoked as a means of excusing a written obligation when they are predicated on unwritten representations. Again, that is not the case here. The Sweeneys' claim for deceptive practices does not seek to avoid their obligations under the loan agreements. Nor does it seek to enforce any oral side agreement. Nor is it predicated simply on oral representations. Rather it asserts a variety of unlawful practices by ComFed and its subsidiaries, under the Massachusetts statute, wholly apart from the enforceability of their loan agreement or any other obligation.[3]

Finally, the decision of the Court of Appeals here warrants review on certiorari, with respect to its ruling under *D'Oench*, not only because it is in conflict with the law in other circuits and exceeds the mandate of *D'Oench* itself, but because it

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[3] Significantly, too, *Langley* did not have cause to address the limiting language in § 1823(e) as to the types of agreements to which it applies. By its own terms, the provision applies only to agreements which "tend to diminish or defeat the interest of the Corporation *in any asset acquired by it*" (emphasis added). The FIRREA counterpart, 12 U.S.C. § 1821(d)(9)(A), appears to incorporate this same limitation by reference. *See supra*, at 3; *see also In re NBW Commercial Paper Litigation*, 826 F. Supp. 1448, 1465 (D.D.C. 1992). The Sweeneys' claim for deceptive practices does not attack the RTC's interest in the Sweeney's loan or in any other identifiable asset acquired by the RTC. The claim seeks only general damages. If such claims for damages were covered by the statutory provisions, the limiting language would be entirely superfluous. *Id.* at 1464 (the word "asset" in § 1823(e) was not meant to merely mean "money;" "under no circumstances ... should the term be interpreted so broadly as to encompass any liability or other existing condition which affects the financial condition of the receivership"). In applying § 1823(e) to the Sweeneys' claim, the Court of Appeals here failed to address this limiting language. Even worse, the district court actually misstated § 1823(e) by omitting the limiting language from its recitation of the rule (B5).

addresses a question of current national importance which should be resolved by this Court.

In the aftermath of numerous failures of savings and loan institutions, the powers of the RTC and its protections under the law are being tested repeatedly. Complaints about overreaching by the RTC are rife. There has been much public protest about a feeling of powerlessness against the RTC. Legislation has recently been introduced in Congress to amend FIRREA so as to make clear that claims such as this are not precluded (K1). Indeed, the sponsor of the bill in the Senate, Senator Cohen, referred to this case in particular, in the Congressional Record, as an example of "the misapplication of the D'Oench Duhme Doctrine" (K11). At the same time, he made clear that the proposed amendment is not intended to "confer a new right" but is intended only to clarify the existing law, which has been misapplied, so as to "ensure that the D'Oench Duhme doctrine applies only in situations where it was originally intended to apply" (K17). In the absence of judicial clarification of *D'Oench*, Congress is evidently responding to a need to clarify existing law (rather than enacting new law), a task which seems more appropriately undertaken by this Court.

II. The Application Of *D'Oench, Duhme* To Entities Other Than Those To Which The RTC Has Actually Succeeded Raises An Issue Of National Importance

In affirming summary judgment, based on *D'Oench, Duhme*, as to the Sweeneys' claims against ComFed Mortgage and ComFed Advisory, the Court of Appeals improperly applied the doctrine, with far-reaching implications, to entities which are not entitled to its protections, even assuming *arguendo* that the claims against ComFed itself would be barred.

On January 11, 1991, the RTC was appointed conservator of ComFed. (G1). It was not appointed either conservator or receiver of either ComFed Mortgage or ComFed Advisory.

Accordingly, the Middlesex Superior Court substituted the RTC as a party defendant for ComFed only (H2).[4]

Nevertheless, the district court below determined that "*D'Oench* and § 1823(e) will also bar plaintiffs' claims under Counts II and VIII against ComFed Mortgage and ComFed Advisory" (B6 n. 4). In so doing, the court relied on *Victor Hotel Corp. v. FCA Mortgage Corp.*, 928 F. 2d 1077, 1083 (11th Cir. 1991), but in *Victor Hotel* it was determined that, unlike here, the regulatory agency (FSLIC) was the successor in interest to the subsidiary. *Id.* at 1083. Where, as here, the RTC indisputably is not the successor in interest to a defendant[5] and is not substituted for that defendant, that defendant should not be shielded by *D'Oench*.[6]

III. There Is A Conflict In The Circuits As To The Meaning Of FIRREA's Removal Provision

In determining that removal of this case to the district court for Massachusetts was permissible, the United States Court of Appeals for the First Circuit rendered a decision in conflict with the law of at least one other circuit.

On January 11, 1991, after its appointment as conservator of ComFed and its substitution in this action for ComFed, the

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[4] On February 1, 1991, the RTC was appointed receiver of ComFed and conservator of ComFed, F.A. (a creation of the RTC), and on September 13, 1991, the RTC was appointed receiver of ComFed, F.A. (A3). However, the RTC was never appointed conservator or receiver of either ComFed Mortgage or ComFed Advisory and was never substituted as a party defendant for either entity. Nor has the RTC, as receiver of ComFed, F.A., been substituted as a party in the action.

[5] The RTC has acknowledged (in other proceedings) that it is not the successor in interest to ComFed Mortgage (into which ComFed Advisory has since been merged) (L2 ¶ 3).

[6] The Court of Appeals failed to address this issue in its decision despite the Sweeneys' having raised it on appeal.

RTC removed this case to the United States District Court for the District of Massachusetts, purportedly pursuant to FIRREA, 12 U.S.C. § 1441a(l)(3) (C3, I1-2). The Sweeneys moved to remand, contending that FIRREA (as it was then effective) permitted removal in a substitution case only to the United States District Court for the District of Columbia. The district court agreed with the Sweeneys that venue was proper only in the District of Columbia (C4). However, the court denied their motion to remand as untimely under 28 U.S.C. § 1447(c) (C4-5).

The Court of Appeals also agreed that venue under FIRREA was proper only in the District of Columbia (A5). However, without reaching the issue of timeliness, the Court determined that remand was properly denied, because removal to the district court in Massachusetts was still permissible under the "general venue provision of 28 U.S.C. § 1441(a)" (A5-6), which allows for removal to the district court for the district "embracing the place where [the state] action is pending." The Court found that FIRREA supplemented rather than replaced 28 U.S.C. § 1441(a) as it applies to the RTC. The Court cited authority for this view (A6) from the United States Court of Appeals for the Seventh Circuit, *RTC v. Lightfoot*, 938 F.2d 65, 68 (7th Cir. 1991), and the United States Court of Appeals for the Ninth Circuit, *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 298 (9th Cir. 1992). *See also RTC v. Nernberg*, 3 F.3d 62 (3d Cir. 1993).

However, the United States Court of Appeals for the Tenth Circuit disagrees. In *RTC v. Westgage Partners Ltd.*, 937 F.2d 526 (10th Cir. 1991), the Court determined that under the law applicable in January 1991, the RTC could remove substitution cases only to the District of Columbia.

Certainly the conclusion of the Tenth Circuit seems the more logical from the face of FIRREA, given the specificity of

§ 1441a(l)(3). *See, supra*, at 3.[7] Moreover, 28 U.S.C. § 1441(a), upon which the Court of Appeals for the First Circuit relied, provides for removal to the district court embracing the place where the state action is pending "except as otherwise expressly provided by Act of Congress." Here, FIRREA did expressly provide otherwise.[8]

Insofar as the FIRREA provision is found to govern the removal here, rather than the general removal provision of 28 U.S.C. § 1441(a), the Sweeneys' motion to remand should also be found timely. The district court determined that the motion

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[7] The removal provision in FIRREA was amended effective February 1, 1992. See supra, at 3. As the Court of Appeals observed, under the amendment, removal to the district court in Massachusetts would have been permissible (A5). The Court expressly declined, however, to render any opinion as to the retroactivity of the amendment, and it appears that no other court of appeals has done so. In the absence of any indication of legislative intent to apply the FIRREA removal amendment retroactively, it should be applied only prospectively, leaving the prior version applicable to the ruling in issue here. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result"). Furthermore, the fact that the venue permissible under the amendment to FIRREA still differs from the venue permissible under 28 U.S.C. § 1441(a) certainly suggests, contrary to the conclusion of the Court of Appeals here, that the FIRREA removal provision is intended to supersede the more general provision with respect to the removal of RTC substitution cases.

[8] The issue of whether the action was properly removed to the district court for Massachusetts rather than the District of Columbia is of substantive and not merely procedural importance, because the district court for the District of Columbia, to which this case should have been removed, takes a very different view of the *D'Oench, Duhme* doctrine from that of the district court for Massachusetts. *See In re NBW Commercial Paper Litigation, supra*. That view is much more in line with the view taken here that the doctrine is limited to claims contesting the validity of unwritten agreements with a failed bank and does not apply to claims for tortious conduct. *Id.* at 1466-68. Accordingly, had the FIRREA removal provision been properly applied, the result in this case would likely have been different.

(filed on March 1, 1991) was untimely under § 1447(c), which provides that "a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after filing of the notice of removal *under § 1446(a)*" (C5-6) (emphasis added). The notice of removal had been filed on January 11, 1991. However, as the district court determined, the removal here was purportedly pursuant to FIRREA's removal provision, 12 U.S.C. § 1441a (C3). Therefore, by its own terms, 28 U.S.C. § 1447(c) does not apply.

Furthermore, § 1447(c) states that it applies only to motions to remand on the basis of any defect "in removal procedure," which procedure is governed by 28 U.S.C. § 1446 (entitled "Procedure for Removal"). Here, the motion to remand was not made on the basis of any non-compliance with § 1446, but rather on the basis of non-compliance with the FIRREA removal provision, which, unlike § 1447(c), has no time limitation for motions to remand.[9]

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[9] In assessing the timeliness of the Sweeneys' motion to remand, it is noteworthy that the decision of the state court of January 30, 1991, purporting to enter judgment in the Sweeneys' favor on the claim for deceptive practices, was not released to the Sweeneys until February 25, 1991, less than one week before they filed their motion for remand (A3). Prior thereto, the Sweeneys were unaware of the decision, because no copies had been mailed to the parties by the court clerk, and, when the RTC learned of the decision by happenstance, counsel for the RTC, without informing the Sweeneys of the decision, removed the decision from the court files upon transporting the record to the federal district court. *Id.* In these circumstances, the Sweeneys should be found to have acted in a reasonably timely fashion.

CONCLUSION

D'Oench, Duhme was not intended to bar all claims against failed banks or their related entities. Nor was the related legislation intended to do so. Instead, the law advises customers of such banks that they cannot rely on oral agreements or representations, as the basis for a claim or a defense, in respect of determining their obligations to the bank or the bank's obligations to them. If, however, the bank is liable for violations of the law which do not depend on the existence of any unwritten agreement, the bank is not immune from otherwise viable claims. Too often, *D'Oench* is being misapplied, as here, to preclude such claims. The Sweeneys' claim for deceptive practices by the bank in violation of state statute does not turn on the enforceability of any unwritten agreement or the validity of any unwritten representation. This Court is respectfully urged to use this occasion to now dispel this confusion about *D'Oench, Duhme* and properly limit it to effecting its intent.

For the foregoing reasons, the petitioners respectfully request that this Court issue a writ of certiorari to review the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

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Nos. 93-1427
93-1613

UNITED STATES COURT OF APPEALS

For the First Circuit

RHETTA B. SWEENEY, ET AL.,
Plaintiffs, Appellants,

v.

RESOLUTION TRUST CORPORATION, ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Edward F. Harrington, *U.S. District Judge*]

Before

Breyer, *Chief Judge*,
Selya and Cyr, *Circuit Judges*.

Rhetta B. Sweeney, on brief pro se.

Paul R. Gupta, *Joseph F. Shea* and *Nutter, McClennen & Fish*, on brief for appellees.

January 31, 1994

Per Curiam. Appellants Rhetta Sweeney, individually and as trustee of the Maple Leaf Realty Trust and of the Canadian Realty Trust, and John Sweeney [the Sweeneys] appeal the final judgment entered by the United States District Court of the District of Massachusetts for appellees Resolution Trust Corporation [RTC], in its capacity as receiver of ComFed Savings Bank, ComFed Mortgage Company, Inc. and Comfed Advisory Company, Inc. [collectively "ComFed"], and Dennis Furey, an employee of ComFed Mortgage Company, Inc. The Sweeneys also appeal the district court award to the RTC of attorneys' fees incurred in responding to what the court found a frivolous motion to remand. We affirm.

Background

In 1987, the Sweeneys borrowed $1,600,000 from ComFed for construction of single family homes and other work on their property in Hamilton, Massachusetts. The obligation is evidenced by a promissory note, a loan agreement and a construction loan agreement, all dated August 27, 1988. The Sweeneys allege that ComFed also agreed to an additional $900,000 in construction financing. ComFed denies that it made any agreement as to a further loan. The Sweeneys defaulted on the note and, in November 1988, ComFed initiated foreclosure proceedings.

In April 1989, the Sweeneys filed a nine count complaint in Middlesex Superior Court asserting various lender liability claims against ComFed and Furey. ComFed filed a counterclaim seeking a determination of the Sweeney's liability to ComFed under the terms of the $1,600,000 note on which the Sweeneys had allegedly defaulted. In October 1989, the superior court issued an injunction barring ComFed from foreclosing on the Sweeney's mortgaged property.

In March 1990, after a twelve day trial, a superior court jury returned a special verdict awarding ComFed $2,069,586.33

for the Sweeneys' breach of the note, and Rhetta Sweeney $65,000 for intentional infliction of emotional distress. The court reserved to itself judgment on two counts: ComFed's alleged violation of Mass. Gen. L. ch. 93A and the claim for specific performance of an alleged agreement by ComFed to a partial release of the mortgage.

On December 13, 1990, the RTC was appointed conservator of Comfed and, on January 11, 1991, removed the case to the United States District Court for the District of Massachusetts.[1] No judgment had yet been entered on the two counts tried to the superior court. However, on January 30, 1991, the superior court purported to enter judgment on those two counts. The court purported to find for the Sweeneys on their chapter 93A claim in the amount of $2,998,931.44, plus interest and costs, and attorneys' fees of $97,704. No copies or notices of this opinion were mailed to the parties by the court clerk.

On January 31, 1991, counsel for the RTC learned of the purported opinion when he went to the Middlesex Superior Court Clerk's office to transport the record to the federal district court.[2] Believing the opinion to be a nullity, counsel contacted the Massachusetts Attorney General's Office to urge that the opinion be withdrawn. The superior court refused to do so and instead released the opinion to the Sweeneys on February 25, 1991. Counsel for the RTC then filed the opinion with the district court under seal and moved to expunge it from the record. On March 1, the Sweeneys filed a motion to remand the

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1 On January 31, 1991, the RTC was appointed receiver of ComFed and conservator of ComFed, F.A. On September 13, 1991, the RTC was appointed receiver of ComFed, F.A. The RTC as receiver of ComFed retains the liabilities in this case while the RTC as receiver of ComFed, S.A. retains the assets. "RTC" as used in this opinion refers to the RTC in both its roles.

2 Testimony was presented before the district court that this was in conformity with Middlesex Court practice.

case to the superior court on the ground that the district court lacked jurisdiction.

After a series of evidentiary hearings, the district court determined that the case had been removed on January 11, 1991 and found that the Sweeneys' objection, which was in the court's view an objection to venue not jurisdiction, was untimely. On January 9, 1992, the RTC moved that the district court enter the superior court jury verdict in its entirety and grant the RTC summary judgment on the two counts which had been tried to the superior court. On April 14, 1992, the district court entered the jury verdict and granted summary judgment to the RTC. On April 27, 1992, the court vacated the superior court injunction. Final judgment was entered on February 9, 1993. On February 13, 1993, Rhetta Sweeney, purporting to act on behalf of all the plaintiffs, filed a third motion to remand the case to the superior court. Finding that the motion made no new factual or legal argument, the district court allowed the RTC's request, pursuant to Fed. R. Civ. P. 11, for attorneys' fees incurred in responding to this motion. The Sweeneys now appeal both the final order of the court and the grant to the RTC of attorneys' fees.

Discussion

The Sweeneys contend first that the district court erred in denying their motion to have the case remanded to the superior court. According to appellants, removal to the United States District Court for the District of Massachusetts was improper since 12 U.S.C. § 1441(a)(l)(3) allows for removal only to the United States District Court for the District of Columbia.[3]

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3 At the time of appellants' motion, § 1441a(l)(3) provided that venue was proper in:

> The United States District Court for the District of Columbia, or if the action, suit or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or receiver has been appointed,

Construing this as an objection to venue, the district court denied the motion on the ground that it had been filed more than thirty days after removal. *See* 28 U.S.C. § 1447(c). The Sweeneys argue that this period should have been tolled because of the RTC's "bad faith" in withholding from them a copy of the superior court's purported judgment, the existence of which the Sweeneys discovered only on February 25, 1991.[4]

Even if we grant *arguendo* that venue in the United States District Court for the District of Massachusetts was improper pursuant to § 1441(a)(l)(3) and that appellants' motion is subject to equitable tolling, we still find no error in the district court's denial of appellants' motion to remand. 28 U.S.C. § 1441(a) provides that

> [e]xcept as otherwise *expressly* provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending. (emphasis added)

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the United States district court for the district where the institution's principal business is located.

Since this suit did not arise "out of the actions of the Corporation," venue was proper only in the United States District Court for the District of Columbia. Section 1441a(l)(3) was amended effective February 1,1992. Under the amended section, venue would be proper in Massachusetts. We express no opinion as to whether this amendment should be applied retroactively.

4 The Sweeneys appear to concede that 12 U.S.C. § 1441a(l)(3) is a venue not a jurisdictional statute. *See In re 5300 Memorial Investors, Ltd.*, 973 F.2d 1160, 1163 (5th Cir. 1992) (federal courts "consistently have construed the former provision in section 1441a(l)(3) . . . as concerning solely venue and not jurisdiction"). The district court had jurisdiction over this action pursuant to 12 U.S.C. § 1441a(l)(1).

Since nothing in 12 U.S.C. § 1441a(l)(3) expressly limits venue, the general venue provision of 28 U.S.C. § 1441(a) is applicable to this case. *See Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 298 (9th Cir. 1992) (removal proper under § 1441(a) since "[n]othing in the statutory language provides that RTC is limited to the specific removal provision found in section 1441a(l)(3)"); *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65, 68 (7th Cir. 1991) (finding removal provision of 12 U.S.C. § 1441a(l)(3) "to supplement, rather than to replace, those of § 1441(a)"). Given that the RTC removed this case to the district court of the United States where the action was pending, venue was proper pursuant to 28 U.S.C. § 1441(a) and appellants' motion to remand was properly denied.

The Sweeneys next contend that the district court erred in not entering the purported judgment of the superior court in their favor. However, the district court supportably found that this case had been removed to the federal court on January 11, 1993. "At that point, the jurisdiction of the state court 'absolutely ceased, and that of the [federal court] immediately attached,'" *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 841 (1st Cir. 1988) (quoting *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882)), and the state court was under an obligation to "proceed no further unless and until the case [wa]s remanded," 28 U.S.C. § 1446(e); *see also Tugman*, 106 U.S. at 122 (once case removed, state court had "duty . . . to proceed no further"). Consequently, the purported judgment of the state court was "void *ab initio*," *Hyde Park Partners*, 839 F.2d at 842, and the district court committed no error in refusing to enter judgment in accord with it.

The Sweeneys' third contention is that the district court improperly granted summary judgment to the RTC on the Sweeneys' claim under chapter 93A § 2(a).[5] Appellants argue

5 Mass. Gen. L. c. 93A § 2 protects against "unfair or deceptive acts or practices in the conduct of any trade or commerce."

that the district court erred when it found that their claim relied on alleged promises not in writing and hence was barred by the doctrine enunciated in *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942) and codified at 12 U.S.C. § 1823(e).

The Sweeneys' principal claim under chapter 93A is that the closing loan documents were "misleading, oppressive, and unconscionable" in that they led the Sweeneys to understand that ComFed would provide them with construction financing in addition to the $1,600,000 loan actually provided. According to appellants, ComFed knew that without the additional financing the Sweeneys would be forced to default on the original agreement, as in fact happened.

The *D'Oench* doctrine applies to the RTC when it acts, as in the instant case, in its capacity as receiver, *see* 12 U.S.C. § 1441a(b)(4)(A), and extends to the financial interests of any wholly owned subsidiaries of a failed institution, *see Oliver v. Resolution Trust Corp.*, 955 F.2d 583, 585-86 (8th Cir. 1992) (citing cases).[6] It bars affirmative claims, whether sounding in contract or tort, when they are premised on an unwritten agreement. *Timberland Design, Inc. v. First Service Bank for Sav.*, 932 F.2d 46, 50 (1st Cir. 1991) (citing cases). To satisfy the strictures of *D'Oench* and § 1823(e) appellants must show an agreement in writing to provide the additional loans. The mere fact that the appellants relied in good faith on an unwritten agreement is not enough. *Federal Deposit Ins. Corp. v. Caporale*, 931 F.2d 1, 2 (1st Cir. 1991).

In the instant case, the Sweeneys have identified no written provision of any loan document which explicitly states that such additional financing would be forthcoming. Rather, they claim that they "reasonably understood" ComFed to have committed itself to such financing based on the language of the agreements.

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6 Furey is not a defendant in the chapter 93A claim.

Yet, the only provisions which they cite in support of this position are far too ambiguous, absent extraneous support, to establish an agreement to fund further construction.[7] At most, they reflect an intention to provide further funds. However, they are insufficient to establish an obligation on the part of ComFed which would meet the requirements of *D'Oench*. *See, e.g.*, *Federal Sav. & Loan Ins. Corp. v. Two Rivers Assoc., Inc.*, 800 F.2d 1267, 1276 (11th Cir. 1989) (requirements of *D'Oench* not met where written provisions reflect only intent to loan additional funds but not obligation to do so); *Beighley v. Federal Deposit Ins. Corp.*, 868 F.2d 776, 783 (5th Cir. 1989) (even though one might derive inference from documents that bank would cooperate in attempt to sell property, requirements of § 1823(e) not met since "not a single document states in writing" that bank agreed to finance buyer).

The Sweeneys also seek to base their chapter 93A claim on ComFed's alleged violation of 12 C.F.R. § 545.32. This provision requires, in relevant part, that a federal savings association may not make a real estate loan if the loan "exceed[s] the applicable maximum loan-to-value ratio limitations prescribed [by the association's board of directors]." 12 C.F.R. § 545.32(d)(4). According to appellants, the $1,600,000 loan

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7 The Sweeneys rely (1) on a clause of the loan agreement which requires them to pay a "1% nonuse fee in the event COMFED does not finance the development and construction of the 7 plus/minus additional lots;" (2) on a clause in the construction loan agreement which states that the "Lender shall no[] longer be bound by this Agreement . . . if said building or buildings and improvements shall not be completed on or before twelve (12) months from the date hereof, but Lender may advance payments but shall not be bound to do so after the date for said completion;" and (3) on a clause in the construction loan agreement which gave ComFed "the right to withhold 10% of the final advance until forty-three (43) days . . . after the full completion of the construction." Neither the references to possible future financing nor the references to the project's completion establish an obligation on the part of ComFed to fund the entire project.

they received was more than the 75% loan to value ratio established by the Board of Directors of ComFed.[8]

Even if the loan granted the Sweeneys violated ComFed's own limitation, and hence 12 C.F.R. § 545.32, we are aware of no authority which would indicate that this violation would be, as appellants assert, a "*per se* violation" of chapter 93A. While violations of certain federal consumer protection statutes may come within the purview of chapter 93A § 2,[9] 12 C.F.R. § 545.32 is not a consumer protection statute but a "means of protecting insured depositors, the [FDIC] fund, and ultimately federal taxpayers." *Saratoga Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 879 F.2d 689, 693 (9th Cir. 1989). We are aware of no authority supporting the claim that an alleged violation of § 545.32 suffices to state a cause of action under chapter 93A. The district court did not err in granting the RTC summary judgment on the chapter 93A claim.[10]

The Sweeneys also assert that, if the case is not remanded, they are entitled to a new trial in federal court on the claims decided by the jury in the state action and entered by the federal district court after removal. The district court, relying on Fed. R. Civ. P. 63, entered judgment on all the claims which had been tried to the jury in the state court action.[11] The Sweeneys do not

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8 The property was appraised at $1,960,000.

9 According to Mass. Regs. Code tit. 940, § 3.16.4:

> an act or practice is a violation of M.G.L. c. 93A, § 2 if . . . [i]t violates the Federal Trade Commission Act, the Federal Consumer Protection Act or other federal consumer protection statutes within the purview of M.G.L. c. 93A, § 2.

10 Since the Sweeneys make only passing reference to the grant of summary judgment on their claim for specific performance, any objection to this judgment has been waived. *See Ryan v. Royal Ins. Co.*, 916 F.2d 731, 734 (1st Cir. 1990) (issue referred to in perfunctory manner on appeal and without developed argumentation deemed waived).

11 Rule 63 provides, in relevant part, that:

contend that the district court was without authority to so enter the judgment. Instead they assert that they suffered prejudice from the entry of the verdict. *See* Fed. R. Civ. P. 63. They argue that they were prejudiced first because the jury verdict was clearly against the weight of the evidence. The Sweeneys also contend that the entry of the verdict prejudiced them because the parties had agreed, prior to the superior court trial, that the jury claims and those presented to the court would be tried on the same set of facts simultaneously. Therefore, the district court should either have entered both the jury verdict and the state court judgment or granted a new trial on all counts.

We find no prejudice from the court's entry of the jury verdicts. As to the first argument, the Sweeneys are entitled to have the jury verdict set aside only if they demonstrate that the verdict was a "manifest miscarriage of justice."[12] *Milone v. Moceri Family, Inc.*, 847 F.3d 35, 37 (1st Cir. 1988) (citing cases). The Sweeneys have failed to meet this exacting standard. As to the second, the jury reached its verdict after hearing the facts presented at trial; summary judgment was granted by the district court to the RTC as a matter of law and on the basis of federal defenses which arose only after the trial. In such circumstances, appellants suffered no prejudice from the failure to try both sets of claims simultaneously to the judge and jury.

> If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties.

12 The Sweeneys moved for a new trial in the state court on the ground that the jury verdict was against the weight of the evidence. This motion was not acted upon before removal and, therefore, was arguably pending before the district court. The district court, however, made no ruling on the motion.

The remaining substantive claims raised by the Sweeneys merit only brief responses. Since the opinion issued by the superior court on January 31, 1991, was void *ab initio*, there is no basis for entering it *nunc pro tunc*. For the same reason, that opinion cannot affect the property of the district court's entrance of the jury verdict.

The RTC did not engage in impermissible forum shopping in removing this action to the federal court. 12 U.S.C. § 1441a(l)(3)(A) allows the RTC to remove an action brought against it in its capacity as receiver even while a state appeal is pending. *Resolution Trust Corp. v. Nernberg*, 3 F.3d 62, 68 (3d Cir. 1993); *Lester v. Resolution Trust Corp.*, 994 F.2d 1247, 1251-52 (7th Cir. 1993); *In re 5300 Memorial Investors, Ltd.*, 973 F.2d 1160, 1162 (5th Cir. 1992); *see also, Federal Deposit Ins. Corp. v. Keating*, No. 93-1230, slip op. at 4-7 (1st Cir. Dec. 29, 1993) (12 U.S.C. § 1819(b)(2), the removal statute for the Federal Deposit Insurance Corporation, identical in relevant part to the RTC removal provision, allows removal while state appeal is pending).

The Sweeneys have failed to make a showing that they have discovered new evidence relating to the issues tried to the superior court jury which would be "of such nature that it would probably change the result if a new trial is granted." *Nickerson v. G.D. Searle and Co.*, 900 F.2d 412, 417 (1st Cir. 1990). The only evidence they have adduced does not appear related to actions which form the basis of their complaint.

The Sweeney's request for an injunction preventing the RTC from foreclosing on the real property securing their $1.6 million dollar note is barred by 12 U.S.C. § 1821(j). *See Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992).

None of the other contentions raised by the Sweeneys as to the disposition of their claims possesses any merit.

Finally, the Sweeneys appeal the grant by the district court, pursuant to Fed. R. Civ. P. 11, of the RTC's request for attorneys' fees incurred in responding to appellants' third motion to remand the case to the superior court. The district court previously denied two almost identical motions and had made detailed findings of fact as to both the date of the removal and the RTC's right to remove. The court did not abuse its discretion in imposing sanctions for this repetitive motion. *See Mariani v. Doctors Assoc., Inc.*, 983 F.2d 5, 7-8 (1st Cir. 1993) (affirming imposition of Rule 11 sanction for filing of second motion which "consisted of virtually *verbatim* argumentation" from a prior motion on which appellants had not prevailed).[13]

The judgment of the district court is *affirmed*. The grant of attorneys' fees to the RTC pursuant to Fed. R. Civ. P. 11 is *affirmed*.

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13 Local Rule 54.3 is inapplicable since this is not a "case[] where the law makes provision for the award of attorneys' fees" but one in which attorneys' fees were imposed as a sanction under Fed. R. Civ. P. 11.

B1

CIVIL ACTION NO.:
91-10098-H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RHETTA B. SWEENEY,
Individually and as Trustee
of the MAPLE LEAF REALTY TRUST
and of the CANADIAN REALTY
TRUST, and JOHN SWEENEY,

Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
in its capacity as Receiver
of COMFED SAVINGS BANK,
COMFED MORTGAGE COMPANY, INC.,
COMFED ADVISORY COMPANY, INC.,
and DENNIS FUREY,

Defendants.

MEMORANDUM AND ORDER

April 14, 1992

HARRINGTON, D.J.

Procedural History

The plaintiffs filed a nine-count Complaint against the ComFed Savings Bank, its affiliates and an individual loan officer (collectively "ComFed") in the Middlesex Superior Court on April 14, 1989, asserting various lender liability

claims. [1] ComFed filed a Counterclaim against the plaintiffs, seeking a determination of the plaintiffs' liability to Comfed under the terms of a $1.6 million loan made to the plaintiffs on which, ComFed asserted, they had defaulted.

A twelve-day trial was held before a fourteen-member jury in the Middlesex Superior Court commencing on February 26, 1990. On March 19, 1990 the jury, by means of a Special Verdict form, found for the Plaintiff Rhetta Sweeney on Count IX (intentional infliction of emotional distress) of the Plaintiffs' Complaint, awarding her $65,000, and for ComFed on Counts I, III, V, and VII, as well as on its Counterclaim, for which the jury awarded ComFed $2,069,580.33. The trial judge, Associate Justice Izzo, reserved to herself the determination of the plaintiff's two non-jury counts, Counts II (specific performance) and VIII (Mass.Gen.L. ch. 93A).[2]

On December 30, 1990, the Office of Thrift Supervision appointed the Resolution Trust Corporation ("RTC") as the conservator of ComFed. Pursuant to the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1441a, the RTC was substituted as the party in interest in this action. The RTC then removed this action, pursuant to FIRREA, 12 U.S.C. § 1441a(l),

1 The Verified Complaint contained nine counts. Count I alleged a breach of contract in connection with the initial $1.6 million loan. Count II sought specific performance of a grant of partial release by Comfed to permit the sale of one parcel of the subject property. Count III alleged fraud in connection with the $1.6 million loan. Count IV alleged a breach of fiduciary duty. Count V alleged a "breach of contract in relation to the forward commitment in relation to the payment of $65,000 in interest . . ." Count VI alleged a "breach of fiduciary duty with respect to the forward commitment in relation to the payment of $65,000 in interest; constructive trust . . ." Count VII alleged interference with advantageous business relations. Count VIII alleged a violation of Mass.Gen.L. ch. 93A, § 2(a). Count IX alleged intentional infliction of emotional distress committed against the Plaintiff Rhetta Sweeney.

2 The plaintiffs waived Counts IV and VI before the case went to jury.

to the United States District Court for the District of Massachusetts on January 11, 1991. *See* Finding of this Court, after an evidentiary hearing, dated May 30, 1991. As of the date of removal, no judgments had been entered in this case.

On January 30, 1991, subsequent to the removal of this case to the Federal Court, Associate Justice Izzo entered her Findings of Fact, Rulings of Law and Order Relative to Count II and Count VIII of the Plaintiffs' Complaint in which she found for the defendants on Count II but for the plaintiffs on Count VIII, awarding them over $3 million in damages and attorneys fees.

The RTC has now moved this Court to enter judgment in accordance with the special verdict on Counts I, III, V, VII and IX of the Plaintiffs' Verified Complaint and on the Defendants' Counterclaim or, in the alternative, grant summary judgment on such claims. In addition, the RTC has filed a Motion for Summary Judgment on Counts II and VIII of the Verified Complaint.

Discussion

Ordinarily, it is the function of the trial court to enter the jury's verdict. Fed.R.Civ.P. 58(2) states, in relevant part, that:

> [U]pon a decision of the court granting other relief, or upon special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment and the clerk shall thereupon enter it.

In this case, the state trial judge had not yet entered the jury's Special Verdict at the time of removal to this Court. However, Fed.R.Civ.P. 63 (effective Dec. 1, 1991) provides:

> If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed with out prejudice to the parties.

Recent, substantial, changes to this rule make clear that it was intended to cover a broad range of circumstances. *See* Notes of Advisory Committee on December 1991 Amendment of Rule. While this case involves a removal from state to federal court, a circumstance which the Advisory committee did not specifically address, this Court can find nothing within the structure of the rule itself, nor in its legislative history that would prevent its application here.

There can be no question that the state trial judge is unable to proceed with his case. This Court is thoroughly familiar with the record. At this stage of the proceedings, the entry of the jury's Special Verdict is nothing more than a purely ministerial act which will work no prejudice on either party. Indeed, it would be contrary to the intent of Rule 63, and a waste of scarce judicial time and resources, to retry a case that has already been fully tried to a jury once before. Therefore, pursuant to Rule 63, this Court hereby GRANTS the RTC's Motion for Entry of Judgment in Accordance with Special Verdict on Counts I, III, V, VII and IX of the Plaintiffs' Verified Complaint and on the Defendants' Counterclaim.[3]

Associate Justice Izzo entered her Findings of Fact and Rulings of Law nineteen days *after* the case was removed to this Court. Accordingly, she was without authority to enter her judgment with respect to Counts II and VIII. The RTC has now moved for summary judgment on those two counts. The RTC alleges that those two counts (indeed *all* of the counts in the Verified Complaint) were grounded upon oral representations made to the plaintiffs by ComFed and are therefore barred

3 In so proceeding, this Court notes that granting summary judgment on these counts in favor of the defendants would not have been inappropriate in light of the applicability of the *D'Oench* doctrine and 12 U.S.C. § 1823(e). *See* Discussion *infra*. Nonetheless, this Court feels that the jury's function and conclusions deserve great deference and that its verdict should be cast aside where, as here, the Court has the power to enter that verdict.

against the RTC under the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and the provisions 12 U.S.C. § 1823(e).

The *D'Oench* doctrine prevents the use of so-called "secret agreements" in asserting a claim against a failed financial institution that has been taken over by the FDIC. *D'Oench*, at 459-460. Section 1823(e) renders unenforceable any agreement which "tends to diminish or defeat" the interests of the FDIC unless such agreement:

> (i) is in writing;
>
> (ii) was executed by such insured bank in default and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the deferred bank in default;
>
> (iii) was approved by the board of directors of such insured bank in default or its loan committee, which approval shall be reflected in the minutes of such board or committee, and
>
> (iv) has been continuously from the time of execution, an official record of such insured bank in default.

12 U.S.C. § 1823(e). Both the *D'Oench* doctrine and Section 1823(e) are applicable to the RTC. 12 U.S.C. § 1441a(b)(4).

The plaintiffs' Mass.Gen.L. ch. 93A claim (Count VIII) is grounded upon an alleged series of agreements and fraudulent misrepresentations that ComFed would provide the plaintiffs with end loan packages and construction financing. Yet, the plaintiffs have produced no copies of these alleged agreements and indeed there is nothing in the record that would indicate they were ever reduced to writing. Oral promises or misrepresentations of this nature are classic examples of "secret agreements that tend to make the [RTC] susceptible to fraudulent arrange-

ments." *Timberland Design, Inc. v. First Service Bank for Savings*, 932 F.2d 46, 48 (1st Cir. 1991).

Plaintiffs, nonetheless, point to several written documents which, they assert, establish the existence of the agreements in question. Mere *evidence* of an agreement, however, falls far short of the strict standard of compliance with Section 1823(e) required by the Supreme Court in *Langley v. FDIC*, 484 U.S. 86 (1987). *See Beighly v. FDIC*, 679 F.Supp. 625, 627 (N.D. Tex. 1988). Since the plaintiffs have failed to produce any written records of the agreements in question, their Chapter 93A claim based thereon is barred against the RTC. *Timberland Design*, 932 F.2d at 50.

The plaintiffs' claim for specific performance (Count II) alleges that ComFed impliedly consented to provide partial releases of the plaintiffs' mortgage once they presented a "reasonable price" for the sale to ComFed. Here too, the record is clear that any implied understanding that may have existed between the parties was neither written nor made part of ComFed's official records. Thus, this claim is also barred against the RTC, pursuant to the *D'Oench* doctrine and 12 U.S.C. § 1823(e).[4]

Therefore, for the reasons stated above, this Court hereby orders the following:

1. That judgment be entered in accordance with the Special Verdict on Counts I, III, V, VII and IX of the Plaintiffs'

4 There is a strong policy underlying both the *D'Oench* doctrine and 12 U.S.C. § 1823(e) to protect the interests of the RTC. *See Langley v. FDIC*, 484 U.S. 86. It is clear that any claims against ComFed's subsidiaries will have an effect on the assets of ComFed, and thus, ultimately on the RTC. Thus, this Court has determined that *D'Oench* and Section 1823(e) will also bar plaintiffs' claims under Counts II and VIII against the ComFed Mortgage Company and the ComFed Advisory Company. *See Victor Hotel Corp. v. FCA Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991); *Oliver v. RTC*, 747 F. Supp. 1351, 1355 (E.D. Mo. 1990).

Verified Complaint and on the Defendants' Counterclaim. Defendants shall be entitled to any additional interest and attorneys fees which have accrued under the terms of the Note minus the amount awarded to the Plaintiff Rhetta Sweeney on Count IX of the Verified Complaint; and

2. That the RTC's Motion for Summary Judgment on Counts II and VIII of the Plaintiffs' Verified Complaint is GRANTED.

SO ORDERED.

/s/
EDWARD F. HARRINGTON
United States District Judge

C1

Civ. A. No. 91-10098-H.

United States District Court, D. Massachusetts.

Rhetta B. SWEENEY,
Individually and as Trustee of the Maple Leaf Realty Trust and of the Canadian Realty Trust, and John Sweeney,
Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
in its capacity as Conservator of Comfed Savings Bank, Comfed Mortgage Company, Inc., Comfed Advisory Company, Inc., and Dennis Furey,
Defendants.

June 7, 1991.

Action was filed against bank and its affiliates, as well as individual loan officer, asserting various lender liability claims. The Resolution Trust Corporation, as conservator of bank, removed action to United States District Court for the District of Massachusetts. Plaintiffs moved to remand. The District Court, Harrington, J. held that: (1) although RTC had absolute right to remove to federal forum, Financial Institutions Reform, Recovery and Enforcement Act required RTC to remove case to District Court for District of Columbia, rather than District of Massachusetts, and (2) plaintiff's failure to object to removal until more than 30 days after notice was filed waived any objection to venue.

Motion denied.

Although the Resolution Trust Corporation had absolute right to remove to federal forum case against bank and its affiliates asserting various lender liability claims, case should have been removed to District of Columbia, rather than District of Massachusetts pursuant to Financial Institutions Reform, Recovery and Enforcement Act. Federal Home Loan Bank Act, § 21A(*l*)(1, 3), as amended, 12 U.S.C.A.§ 1441a(*l*)(1, 3).

Although all federal courts have jurisdiction to hear cases to which the Resolution Trust Corporation is party, venue is proper only in District of Columbia. Federal Home Loan Bank Act, § 21(A)(*l*)(1, 3), as amended, 12 U.S.C.A. § 1441a(*l*)(1, 3).

Plaintiffs in action against bank and its affiliates asserting various lender liability claims waived any objection to venue by failing to timely object to removal of action to District of Massachusetts by Resolution Trust Corporation, party to action, and thus, remand was denied, even though case should have been removed to District of Columbia pursuant to Financial Institutions Reform, Recovery and Enforcement Act. Federal Home Loan Bank Act, § 21A(*l*)(1, 3), as amended, 12 U.S.C.A. § 1441a(*l*)(1, 3); 28 U.S.C.A. §§ 1406(b), 1447(c).

Venue may be waived by party who fails to interpose timely objection. 28 U.S.C.A. §§ 1406(b), 1447(c).

Robert M. Axelrod and Dennis C. Lanzoni, Axelrod, Lanzoni & Teague, Meriden, Conn., Christopher Weld, Jr., Boston, Mass., for plaintiffs.

John D. Hanify, David Lee Evans and Kara M. Lucciola, Hanify & King, Boston, Mass., for defendants.

MEMORANDUM AND ORDER

HARRINGTON, District Judge.

Plaintiffs filed this action against ComFed Savings Bank and its affiliates (collectively "ComFed"), as well as an individual loan officer, asserting various lender liability claims. The case was originally filed in Middlesex Superior Court on April 14, 1989. On December 13, 1990, the Office of Thrift Supervision appointed the Resolution Trust Corporation ("RTC") as Conservator of ComFed. Pursuant to the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1441a, the RTC was substituted as the party in interest in this action. The RTC then removed this action, pursuant to FIRREA, 12 U.S.C. § 1441a(*l*), to the United States District Court for the District of Massachusetts on January 11, 1991. *See* Finding, dated May 30, 1991.

The case is now before this Court on Plaintiffs' Motion to Remand the action back to the Middlesex Superior Court. Plaintiffs contend that FIRREA permits removal only to the United States District Court for the District of Columbia. Thus, plaintiffs argue, removal was improperly effectuated and this Court lacks subject matter jurisdiction to hear the case. Defendants respond that this Court does have jurisdiction to hear the case and that the motion to remand should be denied because plaintiffs failed to interpose a timely objection to the removal.

After a review of all the documents filed in this case, and after a hearing, the Court rules as follows:

1. FIRREA provides that any action to which the RTC is a party "shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction" over such an action. 12 U.S.C. § 1441a(*l*)(1). The clear language of the statue, therefore, establishes that this case falls within the ambit of federal question jurisdiction and, as such, this Court is empowered to hear it. *See, e.g., Garland Independent School District v. Phoenix Woods, Inc. et al.*, 1991 U.S. Dist. LEXIS 1181 at 4, __ F.Supp. __, __ (D.D.C.1991)

(stating that insolvency of defendant institution "created ipso facto federal question jurisdiction pursuant to FIRREA"); *Kirby v. Mercury Savings & Loan Ass'n.*, 755 F.Supp. 445, 447 (D.D.C.1990) (noting that case "might have been brought" in the District of California pursuant to Section 1441a(*l*)(1); *Piekarski v. Home Owners Savings Bank*, 743 F.Supp. 38, 43 (D.D.C.1990) (noting that federal court in Minnesota had jurisdiction over action pursuant to Section 1441a(*l*)(1)).

2. Though Congress conferred broad power upon the federal courts to adjudicate matters concerning the RTC, Congress apparently sought to limit the number of courts that would actually exercise the power. In particular, FIRREA directs the RTC to remove all cases, other than those which arise out of the conduct of the RTC itself, to the district court for the District of Columbia. 12 U.S.C. § 1441a(*l*)(3). Therefore, though all federal courts have *jurisdiction* to hear such cases, *venue* is proper, under Section 1441a(*l*)(3), see *Security Homestead Association v. Eitmann*, 1990 WL 124881 at 4, 1990 U.S.Dist. LEXIS 11053 at 9-11 (E.D.La.1990) (finding that Section 1441a(*l*)(3) addresses the question of venue), only in the District of Columbia.

In this case, then, even though the RTC had an absolute right to remove this case to a federal forum, it should have done so by removing the case to the District of Columbia rather than to this Court. The District of Columbia could have then transferred the case back to this district, if the interests of justice so required. *See, e.g., Kirby*, 755 F.Supp at 448 (transferring case to local federal district court); *United Savings Bank v. Rose*, 752 F.Supp. 506, 508 (D.D.C.1990) (same); *Piekarski*, 743 F.Supp. at 43-44 (same).

3. Nevertheless, a defect in venue will not support plaintiff's motion for remand in this case. Indeed venue may be waived by a party who fails to interpose a timely objection. 28 U.S.C. § 1406(b); *Panhandle Eastern Pipe Line Co. v. Federal*

Power Commission, 324 U.S. 635, 639, 65 S.Ct. 821, 823, 89 L.Ed. 1241 (1944). Here, defendants filed a notice of removal in this case on January 11, 1991. Plaintiffs failed to raise any objection to the removal until March 1, 1991, more than thirty days after notice was filed. Plaintiffs objection, therefore, was untimely. 28 U.S.C. § 1447(c) (requiring that motion to remand on basis of any defect in removal be filed within thirty days after the filing of the notice of removal). As such, this Court finds that plaintiffs have waived any objection to venue, and plaintiffs' motion to remand must be denied.

SO ORDERED.

D1

No. 93-1427 and 93-1613

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Rhetta B. Sweeney, et al.,
Plaintiffs, Appellants,

v.

Resolution Trust Corporation, et al.,
Defendants, Appellees.

JUDGMENT

Entered: January 31, 1994

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed and as follows: **The judgment of the District Court is affirmed.**

By The Court:

FRANCIS P SCIGLIANO
Clerk

[cc:Messrs: Sweeney and Gupta]

E1

Nos.93-1427
93-1613

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RHETTA B. SWEENEY, ETC, ET AL.,
Plaintiffs, Appellants,

v.

RESOLUTION TRUST CORPORATION, ET AL.,
Defendants, Appellees.

Before

Breyer, *Chief Judge*,
Torruella, Selya, Cyr, Boudin and Stahl,
Circuit Judges.

ORDER OF COURT

Entered March 17, 1994

Appellant's motion for en banc reconsideration of this court's opinion and judgment entered on January 31, 1994, is *denied*.

FRANCIS P. SCIGLIANO, CLERK

By:JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Sweeney and Gupta]

F1

Docket No. 89-

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

MIDDLESEX DIVISION

RHETTA B. SWEENEY, INDIVIDUALLY
and as TRUSTEE OF THE
MAPLE LEAF REALTY TRUST
and of THE CANADIAN
REALTY TRUST; and JOHN
SWEENEY, individually

Plaintiffs,

v.

COMFED SAVINGS BANK, COMFED
MORTGAGE CO., INC., COMFED
ADVISORY CO., INC., AND DENNIS
FUREY

Defendants.

VERIFIED COMPLAINT

I. INTRODUCTION

1. a. This is an action brought by a borrower against a lender seeking to restrain a foreclosure and for damages.

b. Plaintiff Rhetta Sweeney owned two parcels of land in Hamilton, Massachusetts. Facing foreclosure on the smaller parcel Plaintiff sought to subdivide the parcels, con-

struct residences on the newly created lots and to rehabilitate existing buildings. Plaintiff had had no prior experience in real estate development.

c. Plaintiff was referred to COMFED. Defendant Furey was the loan officer assigned to the Plaintiff. COMFED at that time, Plaintiff is informed and believes, made the compensation and/or performance evaluation of its loan officers dependant upon the amount of mortgages they obtained or fees they generated. COMFED also manipulated its appraisal process to permit lending to take place. All of these facts were not disclosed to the Plaintiff at the time. Furey also represented to the Plaintiff that he and COMFED were experienced in real estate development. COMFED represented to the Plaintiff that it would not give her financing unless the loan to value ratio was 75% or better.

d. COMFED loaned the Plaintiff to $1.6 Million for the purpose of paying off prior liens, to finance subdivision of the property and to pay interest on the note. COMFED represented to the Plaintiff that its appraisal of the value of the property resulted in approval of the loan. (This meant that the value of the property, unimproved, was appraised by Comfed at $2,100,000; this appraisal, Plaintiff is informed was too high, and caused the Plaintiff overestimate the value of her land in her pricing decisions.) COMFED also promised construction financing for the project when subdivision approval had been obtained, and then end loan financing for prospective buyers. Interest was to be paid out of the loan proceeds.

e. Plaintiff obtained subdivision approval thereby increasing the value of the property by $800,000 or more. She then approached COMFED for the construction loan. COMFED at first permitted the Plaintiff to use portions of the Subdivision Loan for construction, but then refused to process the construction loan (e.g., they did not return Plaintiff's telephone calls for months at a time) and then claimed that the Plaintiff

was in default because the Subdivision Loan proceeds had been exhausted and there were insufficient funds to pay interest. During this period COMFED misapplied funds in the various accounts established by the loan documents; failed to transfer funds as agreed to the account used to pay for professional services in the subdivision process causing many of Plaintiff's check's to bounce, and generally sought to frustrate the development process.

f. These actions injured the reputation of the project and of the Plaintiff making sales difficult. When Plaintiff finally obtained a sale of one piece of property for $775,000 the COMFED unreasonably refused to permit the sale and give the Plaintiff a partial release.

g. COMFED is proceeding with foreclosure against the Plaintiffs' property.

II. PARTIES

2. PLAINTIFF RHETTA SWEENEY resides at 24 Meyer Lane, Hamilton, Essex County, Massachusetts. She brings this action individually and as Trustee of the Maple Leaf Realty Trust, created by a Declaration of Trust dated March 21, 1986, and filed with the Essex County Registry of Deeds at Book 8168, page 399; and as Trustee for the Canadian Realty Trust, created by a Declaration of Trust dated November 15, 1985, and filed with the Essex County Registry of Deeds at Book 8166 page 354 .

3. PLAINTIFF JOHN SWEENEY is the husband of Plaintiff Rhetta Sweeney. He brings this action individually. At all relevant times, Plaintiff John Sweeney has worked and lived near Philadelphia, Pennsylvania, and has returned to Massachusetts when possible on week-ends and vacations.

4. DEFENDANT COMFED MORTGAGE CO., INC. is a Massachusetts corporation having its principal place of business at 44 Middle Street, Lowell, Massachusetts. Defendant

Comfed Mortgage Co., Inc. is a subsidiary of Defendant Comfed Savings Bank.

5. DEFENDANT COMFED SAVINGS BANK is a duly chartered Massachusetts bank with a principal place of business at 44 Middle Street, Lowell, Massachusetts.

6. DEFENDANT COMFED ADVISORY CO., INC. is a Massachusetts corporation with a principal place of business at 44 Middle Street, Lowell, Massachusetts. Plaintiff is informed and believes that Comfed Advisory Co., Inc. does business as Comfed Advisory Company.

7. Defendants Comfed Mortgage Company, Inc., Comfed Savings Bank and Comfed Advisory Company when referred to collectively will be denominated as "COMFED."

8. Defendant Dennis Furey was, at the time of this transaction, a Vice President in the various Defendants COMFED. He was the Plaintiffs' loan officer and, unless specifically indicated, Plaintiffs are informed and believe that all actions taken by COMFED were taken by or approved by Defendant Furey.

III. STATEMENT OF FACTS[1]

A. BACKGROUND

9. In the early part of 1987, Plaintiff Rhetta Sweeney, in her capacity as trustee, owned two parcels of land in Hamilton, Massachusetts. One parcel, consisting of four acres located at 776 Bay Road, was owned in her capacity as Trustee for Canadian Realty Trust, and had upon it an antique house and two barns (hereinafter referred to as the "776 Bay Road Parcel"). The second parcel, located at 24 Meyer Lane, consisted of almost ten acres and was owned by Plaintiff Rhetta Sweeney as Trustee of the Maple Leaf Realty Trust. Constructed on this

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1 An index to the Statement of Facts Section may be found at the end of the Complaint.

parcel was a large house in which Plaintiff John Sweeney's family had lived for five generations (hereinafter the 10 acre parcel will be referred to as the "24 Meyer Lane Parcel").

10. In 1986 and early 1987, Plaintiff John Sweeney had suffered substantial financial reverses, and by the Summer of 1987, the 776 Bay Road Parcel (the 4 acre parcel) was under threat of foreclosure. The 24 Meyer Lane Parcel (the ten acre parcel), while encumbered by several mortgages, was not subject to any foreclosure proceedings and was not at immediate risk.

11. Plaintiff Rhetta Sweeney had been advised that with proper subdivision and development, the potential value of both parcels would be substantially increased. Although Plaintiff Rhetta Sweeney had no prior experience in developing real estate, she decided to develop both parcels in an effort to recoup the financial health of her family. (Hereinafter the term "Plaintiff" shall refer to Plaintiff Rhetta Sweeney, unless otherwise specifically indicated. The term "Plaintiffs" (plural) will be used to refer to both Mr. and Mrs. Sweeney.)

12. Plaintiff proposed to divide the fourteen acres into a subdivision to be called "Rock Maple." Rock Maple was to consist of about six buildable lots, with the two existing residences and several new residences and a residence in a rehabilitated barn, thereby increasing the value of the property.

13. By August of 1987 the Plaintiffs had rented the long time family residence on the 24 Meyer Lane Parcel and had moved into the more modest antique residence on the 776 Bay Road Parcel.

14. In order to obtain financing for her proposed development and to prevent a foreclosure sale of the 776 Bay Road Parcel, Plaintiff applied to several banks for financing. She sought to refinance all of her family's existing debts that could not be repaid by other means into one loan secured by both

parcels, so that all prior liens and many miscellaneous obligations could be cleared up and so that there would be funds available to develop the property.

B. THE $1.6 MILLION SUBDIVISION LOAN AND THE PROMISE OF CONSTRUCTION LENDING

(1) Failure to Disclose Information Concerning the COMFED Lending Process

15. Through a mortgage broker Plaintiff was put in contact in mid-July with Defendant Furey, a Vice President of COMFED, who undertook negotiations on behalf of COMFED for the extension of a loan to Plaintiffs.

16. At all times hereinafter relevant, Defendant Furey represented to Plaintiff that he and COMFED had substantial experience and expertise in the area of subdivision and construction loans and in the administration of such loans. Defendant Furey assured Plaintiff that she could rely on this experience and expertise and that the merits of her proposed subdivision would be objectively assessed by COMFED before any loan was granted to her.

17. Plaintiffs are now informed and believe that in August and September of 1987 Defendant Furey's compensation and/or his job performance evaluation at COMFED was primarily dependant upon the dollar amount of the mortgages that he brought into COMFED or the dollar amount of the fees generated for COMFED by such loans. Plaintiffs were unaware of these facts when they entered into the transactions with Comfed described herein.

18. At all times Defendants Furey and COMFED assured the Plaintiff that the value of the property mortgaged as security for any loan from COMFED would be carefully and realistically assessed

19. Plaintiffs are now informed and believe that appraisals at COMFED were tailored to secure the approval of loans and were not based upon the true value of the property. Plaintiffs were unaware of these facts when they entered into the transactions with Comfed described herein.

20. Defendants COMFED and Furey failed and neglected to inform the Plaintiffs of the facts described in paragraphs 16 and 18 above with the intent that the Plaintiffs would rely on their professed expertise in the area of real estate development and the financing of real estate developments.

(2) The Proposal For a $725,000 Bridge Loan

21. In July, Furey visited the Plaintiff at her home at 776 Bay Road and was shown both parcels, including the antique house in which Plaintiff was then living and the long time family home then rented to a third party. The initial discussions with Defendant Furey related to a bridge loan to stop the foreclosure on the 776 Bay Road Parcel until Plaintiff could arrange construction financing.

22. Plaintiff explained to Defendant Furey her families' financial situation, told him about her plans for the subdivision and told him that she had no prior experience in real estate development. It was clear from these discussions that Plaintiffs did not have sufficient assets or income to make additional interest payments in any substantial amount.

23. On or about July 14, 1987 Defendant COMFED issued a commitment to the Plaintiffs for a $725,000 bridge loan at prime rate + 4% payable within 12 months. This loan was to be secured by a first mortgage on the 776 Bay Road Parcel and a second mortgage on the 24 Meyer Lane Parcel. [Appendix A]

(3) The $1.6 Million "Subdivision Loan"

24. It became clear to Plaintiff that the initial commitment from COMFED for $725,000 would leave her without sufficient cash reserves to cover interest payments on the new mortgage. Plaintiff then discussed with Defendant Furey the possibility of COMFED providing full development lending for the project.

25. Defendant Furey responded that "Rock Maple" was an excellent project and that COMFED was interested in financing a development package for the entire fourteen acres. The first step in the financing process would include a blanket mortgage for both parcels to clear all outstanding debts and to cover subdivision costs of the entire fourteen acres. Defendant Furey specifically assured Plaintiff that COMFED would refinance the subdivision loan with a construction loan to enable her to construct houses within her proposed subdivision, and that COMFED would provide end loan packages to purchasers of the houses in the subdivision. At that time the parties did not know what type of subdivision would be approved by the Town of Hamilton and therefore, the final construction loan had to wait until the subdivision plan was approved.

26. From the beginning until foreclosure proceedings were begun by COMFED, Defendant Furey and COMFED repeatedly assured the Plaintiff that she had a good project and that she should be able to make a substantial amount of money by developing the land and constructing residences on any newly created building lots.

27. On August 4, 1987, Plaintiff received notice that a foreclosure sale of the 776 Bay Road Parcel would be conducted on September 1, 1987 by the then mortgagee, George A. Downey, Trustee. [Appendix B]

28. Within days after discussing the new proposal with Furey, Plaintiff received a loan commitment from COMFED dated August 20, 1987 for a "subdivision loan" of $1,600,000

for the period of one year. According to the Commitment Letter [Appendix C], $1,200,000 of the loan was to be used to satisfy all existing mortgages and liens (hereinafter referred to as the "Lien Account"), $200,000 was to be used for professional services and costs arising from the subdivision process (hereinafter referred to as the "Services Account"), and $200,000 was to be used for interest payments and "soft costs" (hereinafter referred to as the "Interest Escrow Account").

29. It was the clear and explicit understanding of the parties that the $1.6 million loan was a "subdivision loan" for the purpose of enabling the Plaintiff to obtain subdivision and other approvals from the Town of Hamilton and that it would be followed by a construction loan permitting her to install driveways, utilities, to repair, renovate and rehabilitate existing structures, and to construct new residences as permitted by the Town.

30. At all times Defendants Furey and COMFED assured the Plaintiff that the value of her property would be carefully and realistically assessed and that the loan would represent no more than 75% of the value of her property. See Appendix C, paragraph 17(i).

31. As part of the process for the approval of the $1.6 million subdivision loan COMFED had an appraisal performed on the Plaintiff's property. Plaintiffs were informed that the appraisal was sufficient to grant the $1.6 million loan. Since the loan to value ratio stipulated in the Commitment Letter was 75%, approval meant that the Plaintiff's property, without any added value due to the proposed subdivision had been determined by COMFED to be equal to or in excess of $2,100,000.

32. In fact, the value of the Plaintiffs' property was equal to or less than the amount loaned to them, although the Plaintiffs were not aware of this fact until late in 1988.

33. On August 21, 1987, Plaintiff provided Defendant Furey with a list of all outstanding or potential liens on the property which would have to be satisfied from the loan, including a settlement lien estimated to be in the amount of $44,000 to clear the "Virginia Stoney" debts which had been covered by loans from friends of the Plaintiffs. [Appendix D]

34. At all relevant times prior to and during the closing on the $1.6 million loan the Plaintiffs were not represented by Counsel. COMFED was aware of this fact.

(4) The Closing on the $1.6 Million Subdivision Loan

35. On August 27, 1987, the closing for the $1.6 million "subdivision loan" occurred at the offices of COMFED in Lowell. The closing was conducted by an attorney for COMFED, Mr. Robert Coakley. None of the transaction documents had been provided to the Plaintiffs for review prior to the closing.

36. Defendants insisted that Plaintiff's Husband, John Sweeney, sign personally on the note.

37. At the closing, Plaintiffs executed the following documents which had been prepared by COMFED's counsel:

a. A commercial promissory note in the amount of $1,600,000 [Appendix E];

b. A Loan Agreement which amended the commitment letter in certain respects, and in particular, set aside the sum of $1,287,095.60 to "pay off all mortgages and liens;" the sum of $112,904.40 for "architectural, engineering, legal, and other fees necessary to subdivide the land including additional sums required to pay off the mortgages referred to above", and $200,000 for "soft costs and interest to be retained by the Lender" [Appendix F];

c. "Construction Loan Agreement," which was based upon the same $1.6 million promissory note as the subdivision loan [Appendix G];

d. Two Mortgage Security Agreements, one for each of the two pieces of property [Appendices H-1 and H-2];

e. A Statement of Transaction indicating the initial disbursement of the $1,287,095.60 from the Lien Account [Appendix I];

f. An Approval and Authorization of Direct Deposit which authorized COMFED to establish a checking account into which it would deposit funds to be drawn by Plaintiff Rhetta Sweeney upon approval of invoices by COMFED [Appendix J];

g. A Collateral Assignment of Leases and Rents;

h. Certificates of Trustees;

i. Two Directives from Beneficiaries of the Trusts;

j. Affidavits of Commercial Purpose;

k. Borrowers' Statements Regarding Availability of Utilities;

l. Various U.C.C. documents.

38. At the closing COMFED charged the Plaintiff, among other charges, four points as a loan origination fee, $64,000, a $4800 Administration and documentation fee, an Application and processing Fee of $500 and an appraisal fee of $2750. Therefore, at the closing COMFED made an immediate $72,050 [Appendix I].

39. The interest costs under the $1.6 million "subdivision" loan were, at the beginning, more than $14,000 per month.

40. Defendants Furey and COMFED had a duty to inform the Plaintiffs that the appraisal process at COMFED was geared to the approval of loans and that Defendant Furey had a substantial personal financial interest in writing the loan and obtaining the business and the mortgage for COMFED. Defendants wrongfully failed to inform the Plaintiffs of these facts with the intention that the Plaintiffs would sign the Commitment Letter [Appendix C] and go through with the closing in reliance on the appraisal and in reliance on Furey's purported objectivity as a bank officer with fiduciary obligations to his depositors.

41. Defendant Furey made the representations concerning the expertise of COMFED in granting and administering construction loans and concerning the viability of the Plaintiff's project with the intention that the Plaintiffs should rely on those representations in signing the Commitment Letter and in closing on the loan.

42. Plaintiffs signed the Commitment Letter [Appendix C], signed the documents presented to them by COMFED at the closing and Plaintiff Rhetta Sweeney continued to work on the Rock Maple Development in reliance upon Defendant Furey's representations described above and on Furey's and COMFED's continued statements that they felt that Rock Maple was a good project and that Plaintiff should be able to make money on the development.

43. Throughout the next fifteen months the Plaintiff, ignorant of COMFED'S false appraisal practices, relied upon this evaluation of her property in making decisions as to the price of the various parcels and as to the viability of the project.

44. The Defendants COMFED and Furey represented to the Plaintiffs that the Plaintiffs had a commitment from COMFED for construction lending when COMFED and Furey knew that COMFED did not consider itself committed to the construction loan. They failed to inform the Plaintiff of this fact.

45. The representations described above were made for the purpose of inducing the Plaintiffs to enter into the loan transaction and to grant COMFED a mortgage. At that time Defendants COMFED and Furey made the above described representations for the purpose of inducing the Plaintiffs to enter into the loan transaction and to grant a mortgage to COMFED. Had the Plaintiffs known the truth about the representations described above they would not have entered into the loan transaction and granted Furey a mortgage.

C. PLAINTIFF'S SUCCESSFUL SUBDIVISION OF THE PROPERTY INTO SIX PARCELS; INCREASING THE VALUE BY $800,000 OR MORE

46. Because interest costs on the loan were so high, and in reliance on the representations made by COMFED, from the time of the execution of the Commitment Letter in August of 1987 until November of 1988, a period of 15 months, the Plaintiff worked full time on the Rock Maple project. Defendants knew or should have known of this fact.

47. To subdivide the property into additional building lots approvals were necessary from the Planning Board, Board of Appeals, the Board of Health, Department of Public Works and Conservation Commission in Hamilton.

48. Plaintiff hired an attorney experienced in Real Estate Development, Mark Glovsky, Esq., and an engineer and other professionals as necessary to participate in the subdivision process.

49. Plaintiff and her professionals worked with town officials and attended numerous hearings or board meetings. By working closely with attorney Golvsky and the other professionals, the Hamilton Planning Board and the abutters, the Plaintiff secured tentative approval in late January, 1988 of the Rock Maple Flexible Subdivision; formal oral approval followed on

February 22, 1988 and written approval was endorsed on the Plan on March 21, 1988. [Appendix K].

50. Obtaining approval of a subdivision by the Hamilton Planning Board was the substantial hurdle in obtaining the approval of the Rock Maple subdivision. Obtaining such approval in a period of 7 month period is an extremely quick result.

51. In order to avoid appeals from abutters which would have slowed down the project, the Plaintiff went to approximately 8 abutters and discussed the project with them, seeking to take their concerns into account and granting written agreements to two of the abutters.

52. At the present time, the subdivision plan has been approved except for certain administrative formalities, the subdivision process is complete. It is filed at the Salem Registry, Book No. 251, Plan Four.

53. Plaintiff kept Defendant Furey advised of the status of the approval process sending him copies of plans, letters and other documents. On January 26, 1988 Plaintiff wrote to Defendant Fury and informed him of the oral approval of the subdivision by the Planning Board. [Appendix L]

54. By early 1988, the project consisted of the large house at 24 Meyer Lane Parcel and three acres of land; the antique house at 776 Bay Road; 3 buildable house lots and one lot with the two barns on it.

55. Plaintiff's actions in obtaining approval of the Rock Maple Flexible Subdivision Plan increased the value of the land by $800,000 or more.

D. COMFED'S REFUSAL TO PROVIDE CONSTRUCTION FINANCING

56. Because interest charges were accumulating at the rate of more than $14,000 per month, speed in the development process was of the essence to the Plaintiff. COMFED was aware of this fact. COMFED also knew that the Plaintiff had no capacity to repay the interest or principal of the $1.6 million subdivision loan unless this project was developed and sold.

57. In January of 1988, as soon as it became apparent what type of subdivision the Town would permit, the Plaintiff began the next phase of the project, i.e., completing negotiations with the abutters to ensure that there were no appeals, obtaining permits to install utilities and driveways, obtaining estimates for the construction, putting that portion of the project that was immediately saleable (the houses at 24 Meyer Lane and 776 Bay Road) on the market, and arranging the construction financing from COMFED. At that time, Plaintiff had no indication that COMFED would refuse to provide construction financing.

58. In late January, 1988, after the verbal approval of the Rock Maple Subdivision Plan by the Hamilton Planning Board the Plaintiff, as she had been instructed by COMFED, arranged an appointment with a COMFED construction loan Vice President to discuss a construction loan.

59. In early February, 1988, a Vice President of Comfed Advisory Company, Helen L. Pullin, met with the Plaintiff and discussed the construction financing. Plaintiff was instructed to obtain estimates for construction and then to meet with Pullin for the next step.

60. In March of 1988 Plaintiff met with Defendant Furey and they discussed the development project. At that time it was not practical to offer the new lots for sale because utilities and driveways had not been installed. It was decided to market the two existing houses. It was further decided that roofing and other

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work at the 776 Bay Road house would enhance its salability and it was agreed that the Plaintiff would obtain proposals for that work.

61. Plaintiff obtained estimates and submitted them to Defendant Furey. After he approved the work, construction began. These construction expenditures amounted to $36,844.99.

62. The construction expenditures were approved by Defendant Furey despite the fact that they were not contemplated by nor were they permitted under the loan documents for the $1.6 million "subdivision" loan and despite the fact that there was already an insufficient amount of money left in the loan to pay interest to maturity (See Section E below.).

63. When Plaintiff agreed to these additional expenditures, which were not contemplated or permitted by the loan documents for the $1.6 million subdivision loan, she was not aware that COMFED would not honor its commitment to grant construction financing, nor was she aware that this disbursement would contribute to a situation in which there would be insufficient funds to pay the interest on the $1.6 million note. Had Plaintiff been aware of these facts she would not have permitted any funds to be spent on construction, but would have insisted that all funds be used for the purpose of keeping the loan interest current.

64. Plaintiff obtained construction estimates and met with Ms. Pullin at the offices of COMFED on May 23, 1988. The Plaintiff and Ms. Pullin made arrangements for Ms. Pullin to come to the Plaintiff's home (Plaintiff was now living at 24 Meyer Lane) for the final process of obtaining the information necessary for the construction loan. A specific day was selected but no time was set for the meeting. Ms. Pullin was supposed to call the Plaintiff back with a time to meet. Although Plaintiff called Ms. Pullin several times, she received no return telephone call.

65. On May 24, 1988 Defendant Fury, without any prior warning, sent the Plaintiff the following letter:

> This letter will serve as a confirmation of our telephone conversation approximately ten days ago regarding the suspension of any further advances from your loan proceeds (except for the completion of the roof on Bay Road). [Appendix M]

There was, in fact, no such telephone call ten days before the letter of May 24, 1988. The letter of May 24, 1988 was the first indication that the Plaintiffs had that COMFED would make no further advances.

66. Defendant Furey refused to return the Plaintiffs' telephone calls during June, July and early August.

67. As a result of COMFED'S failure to respond to the Plaintiff, she was unable to obtain construction financing.

E. COMFED'S WRONGFUL DISBURSEMENT OF ESCROW ACCOUNT FUNDS

68. At the closing Plaintiffs were told that a formal authorization to establish the escrow account would be sent to them in the mail; the authorization was sent on September 25, 1987, and returned by Plaintiffs on October 1, 1987. [Appendix N]

69. COMFED insisted that it retain control of all funds and make all accountings.

70. As a result of the representations to the Plaintiffs and its requirement as the lender that it give approval to and control all disbursements, COMFED undertook a fiduciary duty to the Plaintiffs to properly apply the funds held by it. COMFED also assumed an obligation to properly account for said funds and to inform the Plaintiff of any impending deficiencies in any of the accounts in sufficient time to provide Plaintiffs a reasonable opportunity to obtain other funds.

71. Under the express terms of the Loan Agreement, any "additional sums required to pay off the mortgages" were to be taken from the Services Account. [Appendix F, page 2].

72. Under the express terms of the Loan Agreement, funds in the Interest Escrow Account were set aside *only* for the payment of interest and "soft costs." [Appendix F, page 2]

73. The Plaintiffs relied entirely on COMFED's previous representations of financial, managerial and supervisory skill and expertise, and until May 24, 1988 believed that disbursements were being made from the accounts designated in the Loan Agreement.

74. In violation of these contractual provisions and its obligations, COMFED failed to keep the accounts separate and failed to render to the Plaintiffs separate accountings for the two active funds, the Interest Escrow Account and the Services Account.

75. At the closing Plaintiffs had brought to COMFED's attention the fact that the outstanding debt of approximately $42,000 to cover the Virginia Stoney lien had not been satisfied. This obligation, which had been included on the list of obligations to be paid off which had been given to Defendant Furey before the closing [Appendix D], had not been satisfied. Plaintiff also requested a personal advance to herself for living expenses and development costs incurred prior to closing, in the sum of $20,000. Defendant Furey approved this disbursement.

76. On September 3, 1987, Defendant Furey authorized the disbursement of the sum of $62,000 to satisfy the Stoney debts and to advance the approved personal loan to Plaintiff Rhetta Sweeney;

77. Contrary to the express terms of the Loan Agreement, Defendant COMFED took the sum of $62,000 from the Interest Escrow Account, and not from the Services Account. [Appendix O].

78. As a result of the unauthorized withdrawal from the Interest Escrow Account to pay the $62,000, the Interest Escrow account of $200,000 was now reduced to $138,000 before any interest had been charged against it.

79. Assuming no increase in interest rates above the then existing 12.25%, the annual interest on the $1,350,000 disbursed as of September 3, 1987 would have been $165,375, leaving a deficit at that time of $27,000. Since the total loan was $1.6 million COMFED knew or should have known that the interest deficit would ultimately be much higher as development expenses were charged against the available loan funds.

80. The only, funds available to pay for these liens was the Services Account, which, had the $62,000 been deducted from that account, would have been cut in half. COMFED never instructed the Plaintiff that she would have to curtail her use of professionals in the subdivision process nor that the Services Account was in a projected deficit situation.

81. In fact, Plaintiff completed the subdivision process for a total of approximately $88,474 ($26,564,97 of this amount has not been paid by COMFED and remains outstanding), some $24,000 less than the $112,904 initially budgeted for the Services Account.

82. At all times hereinafter relevant, COMFED knew or should have known that the amount remaining in the Interest Escrow Account would no longer be sufficient to pay all the interest for which Plaintiffs had contracted and that Plaintiffs had no capacity to pay this interest by any other means.

83. At no time were the Plaintiffs given notice that there were insufficient funds in the Interest Escrow Account to satisfy the mortgage because funds had been taken from this account improperly and without authorization.

84. Instead of notifying the Plaintiff that there was an insufficient amount of interest in the loan to cover the full term

of the loan, COMFED said nothing and permitted the Plaintiff to work full-time on the subdivision approval and other project related matters.

85. To compound the problems, in March of 1988 COMFED approved the expenditure of more than $36,845 for improvements and repairs to the 776 Bay Road Property. These payments were not contemplated or authorized by the loan documents.

86. The chart below demonstrates that as of the end of September 1987 and every date thereafter Comfed knew or should have known that there was not sufficient money in the Interest Escrow Account, or any account, to pay the interest for the full term of the loan nor was there sufficient money to pay subdivision costs. However, COMFED did not inform the Plaintiffs of this fact.

Date	Funds Available	Monthly Interest & Late Charges	Principal Amount
9/30/87	not provided	$14,216.91	1,349,095.60
10/31/87	not provided	14,775.91	1,367,672.53
11/30/87	not provided	14,684.72	1,393,209.24
12/31/87	not provided	14,912.50	1,413,409.16
1/31/88	$152,132.50	15,224.32	1,447,867.50
2/30/88	136,123.88	15,173.85	1,463,876.12
3/31/88	98,786.66	15,966.39	1,501,213.34
4/30/88	75,604.42	15,269.05	1,524,395.58
5/31/85	25,969.19	16,749.15	1,574,030.81
6/30/88	14,008.22	34,761.39[2]	1,585,991.78
7/31/88	.20	44,432.68	1,599,990.80
8/31/88	.20	63,761.80	1,599,990.80
9/30/88	.20	83,350.67	1,599,990.80

2 Prior to this point in the chart the interest was paid every month. This figure and all subsequent figures in this column are cumulative interest and late charge figures.

87. At all times Comfed commingled the funds in the Services Account and in the Interest Escrow Account and failed to provide the Plaintiffs with any monthly account of the balance remaining in each account.

88. Had COMFED kept and given an accounting of the Services Account and of the Interest Escrow Account to the Plaintiff, the deficiencies would have been very evident to the Plaintiff.

89. Plaintiff, relying on COMFED's promise of construction financing was spending her time trying to advance the project. She did not monitor the figures in the COMFED statements because she had been assured by COMFED that she would receive additional financing for construction.

90. Comfed's failure to arrange for and to approve the promised construction financing caused the loan to go into default after the funds had been taken from the Interest Escrow Account in violation of the Loan Agreement.

F. COMFED'S FAILURE TO TRANSFER FUNDS INTO THE PLAINTIFF'S CHECKING ACCOUNT

91. On August 28, 1987, pursuant to the Loan Agreement signed the previous day [Appendix F], COMFED established a checking account for Plaintiff Rhetta Sweeney, and deposited therein the sum of $20,000 which COMFED had agreed to advance to pay previous debts [Appendix O]. This money was spent by the Plaintiff.

92. COMFED's procedure with respect to payments to delay expenses of the subdivision process was for the borrower to send in an invoice. COMFED would then deposit the money in the borrower's bank account and the Borrower would write a check on the account if he or she did not hear from COMFED within 48 hours that the invoice had been disapproved.

93. Pursuant to the procedures established by COMFED, Plaintiff submitted invoices, waited at least 2 days (actually the Plaintiff usually waited four days) to hear if the invoices had been rejected and then wrote checks against the account.

94. On April 18, 1988, Plaintiff sent a request for disbursement with the invoices attached for Glovsky and Glovsky (a law firm which was preparing documents for the subdivision), in the amount $4,612.50, Andover Engineering (for design work on the subdivision) in the amount of $13,726.31; the Town of Hamilton in the amount of $3977.20; Fogarty and Associates for consultation in planning the subdivision, in the amount of $1500; Murdoch, Inc. for authorized repair work to the Bay Road house, in the amount of $1500; Stirling Brown Architects in the amount of $2895.64; and Brown and Rowe for landscaping consultation in the amount of $1752.80. [Appendix Q]

95. On April 26, 1988, Defendant Furey, without consulting with or informing Plaintiff, disapproved the payment of the above described invoices in their full amounts, and reduced them to the following payments: Glovsky and Glovsky from $4,612.50 to $1,762.50; Andover Engineering, from $13,726.31 to $8,572.14; Fogarty and Associates from $1500 to nothing; and Stirling Brown from $2,895.64 to $1,179.79.

96. As a result of Defendant Furey's failure to notify Plaintiff that less than the full invoices had been honored, she believed that the amount of $29,964.45 had been deposited in her account, whereas in fact, only the amount of $18,744.43 had been deposited. [Appendix Q]

97. COMFED failed to notify the Plaintiff of these failures to approve the invoices she had sent to them. Plaintiff proceeded, after the customary delay, to write checks to cover the invoices;

98. As a result, the payments to Brown and Rowe, Stirling Brown, Fogarty, the Town of Hamilton, Andover Engineering, and Murdoch failed to clear;

99. Eventually, Plaintiff was able to cover all the checks except Brown and Rowe, whose bill for $1752.80 is still outstanding.

100. Plaintiff frequently wrote to Defendant Furey complaining of the failure to pay the professionals who had worked on the subdivision and other expenses of the subdivision process. [Appendices 52 & 53]

101. Furey never responded to the Plaintiff's letters on this topic except that on May 24, 1988 in his letter informing the Plaintiff that no further disbursements would be made, Defendant Furey sent to the Plaintiff information concerning the disbursements from the Services Account with a letter saying "I am also enclosing for your review a copy of the disbursement records that we have, so that you may find any discrepancies that might have occurred." [Appendix M]

102. COMFED had paid only $61,909.70 in development costs (not including construction payments to Mr. Murdoch) out of an amount originally budgeted of $112,904.40.[Appendix F page 2]. COMFED refused to pay Andover Engineering the sum of $9,825.50; Brown & Rowe $5,577.66; Golvsky $688; Stirling Brown Architect $175.90 for a total of $16,267.06 in additional costs. In December of 1988 Plaintiff received a bill from Simmons Associates in the amount of $10,297.91. This amount would have still left the Plaintiff some $24,000 under budget for soft costs.

103. Plaintiff John Sweeney analyzed the disbursement documents. The records from Comfed were in such disarray that it took him three days to do the work. Plaintiff John Sweeney then called Defendant Furey and gave him the results of his analysis. Furey agreed to pay some of the bills from Murdoch and one or two others.

104. The effect of the bounced checks and of the refusal to pay was to injure the Plaintiff's reputation in the community and

to chill sales by raising questions in the real estate community about the viability of the Plaintiff's development.

G. COMFED'S WRONGFUL DECLARATIONS THAT THE NOTE WAS IN DEFAULT

105. On June 29, 1988 COMFED sent to the Plaintiffs a notice that they were in default of their loan. [Appendix R] Plaintiff called Defendant Furey who would not take her call. She then called Attorney Coakley and Ms. MacCormack at COMFED, notified them of the error and asked if they could give Furey a message about the June 29, 1988 notice.

106. On July 6, 1988 COMFED acknowledged the error but asserted that interest was in arrears a total of $25,878.37. [Appendix S]

107. On July 27, 1988 COMFED again wrote to the Plaintiffs, informed them that the $1.6 million loan would mature on August 27, 1988 and asked them to pay the note to avoid a default. [Appendix T].

108. On August 19, 1988 Attorney John D. Hanify representing COMFED wrote to the Plaintiff, alleged that the Note was in default for nonpayment of interest and stated that foreclosure proceedings "will be commenced forthwith." [Appendix U]

H. COMFED'S ACTIONS IN OBTAINING 65,000 UNDER FALSE PRETENSES

109. In July and August of 1988 Plaintiff and Scott Ainsworth, a local builder, were discussing a business arrangement whereby Mr. Ainsworth would act as the builder on the project at cost and receive a 20% share of the profit at the end.

110. August 23, 1988 through the intercession of a third party the Plaintiff met with a Mr. Crowley of the COMFED construction loan department and complained of the negligent

mismanagement described above, including the failure of Furey to return the Plaintiff's telephone calls.

111. The afternoon of Plaintiff's conversation with Crowley, Defendant Furey called Plaintiff and they arranged a meeting for August 25, 1988. At the meeting, Defendant Furey, still assuring the Plaintiff that she had a good and viable project agreed, to provide the previously promised construction lending if the Plaintiff brought her interest payments current.

112. Two subsequent meetings were held with Ainsworth, the Plaintiff, Furey, and William Porter, another COMFED Vice-President. Plaintiff and Ainsworth presented Comfed with a proposal to complete the construction of project. In the discussions COMFED was informed that there was a November 15 deadline in Hamilton for making application for building permits during the year (because of the Winter Season), and that sales prices of the then existing houses could be maximized by making renovations and performing site work costing a total of approximately $110,000.

113. The Plaintiff and Ainsworth stressed to COMFED the need for speedy action to free up money to begin construction and informed COMFED of the disastrous effects delay would have on the project which had already been substantially prejudiced by COMFED's failure to timely grant the construction loan.

114. COMFED suggested that it would leave the 1.6 million mortgage in place and give the Plaintiff a small construction loan of $175,000 along with a written forward commitment for additional construction lending for the entire project.

115. Since Plaintiff did not have the money to pay the $65,000, Ainsworth offered to pay it. COMFED promised that the first $65,000 of the new loan would be repaid to Ainsworth. The remaining funds would be available for construction. De-

fendant Furey stated that if the $65,000 was not paid by Friday, September 30, 1988 that there would be no deal.

116. On September 30, 1988, Ainsworth's associate, Kenneth Cornell through, attorney Philip Litman, paid $19,000 in back interest to COMFED. An additional $46,000 was paid on October 3, 1988. In return, COMFED gave to the Plaintiff a letter committing to the $175,000 construction loan: "$65,000 Reimbursement of interest; $35,000 curb cuts & utilities; $10,000 staining of Bay Road home; and $65,000 Improvements to Meyer Lane; [total] $175,000." [Appendix V].

117. Litman and Cornell required the Plaintiff to provide separate security for the $65,000 payment. At their request the Plaintiff signed a note and a security agreement for her personal possessions, including jewelry and furniture. These items were heirlooms and of great sentimental value to the Plaintiff. [Appendix W].

118. In reliance on the commitment letter the Plaintiff and Ainsworth proceeded to satisfy the conditions necessary to begin construction. For example, the Plaintiff began to negotiate with Boston Gas. New England Telephone, the Department of Public Utilities, and Massachusetts Electric for utility hook-ups and driveways, and the Plaintiff and Ainsworth began to negotiate a construction covenant required by the Town of Hamilton before construction could proceed.

119. On October 18, 1988 the Defendant issued a commitment letter to the Plaintiff for the $175,000 [Appendix X]. The Commitment Letter contained many provisions which were not reasonable in light of the agreements between the parties and in light of the circumstances of the transaction, and which were contrary to the original agreement between the parties, including but not limited to the following:

a. the commitment Letter contained a requirement that the Plaintiff escrow 9 months of interest to

maintain debt service on both the $175,000 loan and the $1.6 million subdivision loan (see page 9 item 21 (o)); the amount of this interest alone would have been in excess of the $110,000 available for construction from the $175,000 loan;

b. there was no forward commitment for further construction lending;

c. there was no provision in the schedule of uses permitted for the funds for the payment of interest;

d. the loan documents contained a representation from the Plaintiff that she had other adequate funds to complete the project; which fact COMFED knew was untrue;

e. there was no provision for partial releases which were essential for a multilot project; and

f. the loan costs were excessive.

120. The Commitment Letter provided that the Plaintiffs' only recourse in case of a dispute was against COMFED and not its officers. (Appendix X item 24).

121. On October 24, 1988 the Plaintiff, Defendant Furey, and William Porter met and discussed the terms of the Commitment Letter. At that time the parties agreed that there would be a forward commitment to additional construction financing; a limitation on the loan costs, and a partial release schedule. Later COMFED agreed to drop the requirement that interest on both loans be escrowed in advance.

122. Thereafter Plaintiff called Defendant Furey frequently to see about a closing date. Plaintiff frequently reminded Defendant Furey that time was of the essence. A closing was finally

scheduled for November 14, 1988, the day before the deadline for construction permit applications.

123. A new Commitment Letter was issued on November 10, 1988. [Appendix X] in which the only change was that the interest escrow provision was deleted. This Commitment Letter was faxed to Mr. Sweeney in Philadelphia and never sent by COMFED to Plaintiff Rhetta Sweeney. John Sweeney sent the Commitment Letter of November 10, 1988 to Rhetta Sweeney who received it the Saturday before the scheduled Monday closing.

124. On November 10, 1988, since the list of work to be performed with the loan proceeds previously submitted to COMFED was now out of date in that it was too late to perform stucco work on the 24 Meyer Lane home, the Plaintiff delivered to the office of the attorney for Comfed a new list of proposed expenditures plus invoices to substantiate the costs [Appendix Z].

125. On the November 12, 1988, the Saturday before the scheduled November 14, 1988, closing Plaintiff received a demand from Defendant COMFED for the $1.6 million subdivision loan asserting that she was $37,759.64 in arrears. [Appendix AA].

126. On November 14, 1988 Plaintiff and her attorney, Kathleen Bildzog of Powers & Hall, arrived at the offices of Comfed for the closing. Present for the purposes of conducting the closing was Ms. Karen MacCormack from COMFED and Attorney Coakley. Mr. Furey was working in the next office and Ms. MacCormack frequently consulted with persons in that office throughout the closing. The following occurred at the closing.

a. COMFED agreed to drop its requirement that interest for the entire period of the second mortgage which was to become due on both the

first mortgage (of $1.6 million) and the second mortgage (of $175,000) be held in an escrow account;

b. COMFED agreed upon the following partial release figures: (a) 80% to the bank and 20% to Plaintiff (of either the appraised value or the sales price, whichever Plaintiff chose at the time) *or* (b) a mutually agreeable figure;

c. COMFED agreed that the forward commitment for construction loan financing dated November 14, 1988 would be firmed up into a real commitment; a copy of the forward commitment originally proposed by Comfed is attached and marked Appendix BB;

d. COMFED agreed to disburse at least $83,650 at closing and was willing to discuss a higher figure;

e. COMFED agreed to consider the schedules of values Mrs. Sweeney submitted at the November 14, 1988 closing (dated November 9, 1988);

f. COMFED refused at the closing to agree to defer interest payments until maturity date or to allow semi-annual or quarterly interest payments;

g. COMFED agreed to reduce various closing costs; and

h. COMFED refused to agree at the closing to modify the Brokerage and Claims provision [Appendix CC].

127. The closing on November 14th was adjourned so that the loan documents could be revised according to the agreements reached during the meeting and to reflect the decision of COMFED on the remaining revisions under consideration, i.e.

items f and h above, as well as the revised schedule of values submitted by Plaintiff. Mr. Coakley, the attorney for COMFED, stated that he would prepare new loan documents for review by Attorney Bildzog within a day or two.

128. Attorney Coakley was informed at the closing that Cornell and Litman had required Mrs. Sweeney to pledge her personal property as security for the $65,000.

129. On November 15, 1988, the day after the adjourned closing, Mr. Cornell demanded that the Plaintiff turn over to him her personal property, including her household furniture and jewelry. On the same day, Cornell filed suit against the Plaintiff in the Essex Superior Court seeking authority to sell her personal property.

130. On November 15, 1988 attorney Coakley wrote to Attorney Bildzog and stated that "If the Bank is able to work out with Rhetta the Disbursement Schedule and the partial release consideration, I will restructure the . . . documents along the lines we discussed." [Appendix DD].

131. On November 16, 1988 Ms. Bildzog wrote to Attorney Coakley requesting the documents. [Appendix DD].

132. On November 17, 1988 the Plaintiff wrote to Ainsworth stating that she was attempting to work with COMFED "in hopes that they will live up to the commitment which Defendant Furey and Bill Porter [another COMFED Vice President] made to you and me. ... I have every intention of meeting my financial obligation to you."

133. On November 18, 1988 attorney John D Hanify representing COMFED and Attorney Bildzog discussed the pending matters between the parties. On November 21, 1988 attorney Hanify wrote to Attorney Bildzog and (1) demanded a complete release of all claims that Plaintiff had against COMFED, (2) stated that COMFED would not alter the November 14, 1988 forward commitment in any respect; and (3) insisted that Plain-

tiff pay current interest although COMFED knew that she had no resources to do so. [Appendix DD].

134. Attorney Hanify's first demand was contrary to the Commitment Letters dated October 18, 1988 and November 10, 1988, [Appendices X & Y] which both explicitly provide at item #24 that:

> . . . [I]n the event there is a dispute with respect to this Commitment or any loan granted pursuant hereto, the Borrower and an [sic] guarantors shall look solely to the Lender for performance of any obligations hereunder or under any such loan or for any other claim.

The second demand, was contrary to COMFED's express promise at the closing to alter the November 14, 1988 commitment letter so that it was a meaningful document.

135. On November 22, 1988 Attorney Bildzog wrote to Mr. Hanify setting forth the situation as she saw it. [Appendix DD] She also informed Mr. Hanify that:

> Everything being discussed now was agreed to back then, otherwise no money would have been paid to the bank. The papers were to be signed immediately. As soon as Comfed received the $65,000 they reneged on the deal and brought the process to a virtual stand still.

136. On November 28, 1988 Attorney Hanify wrote to Attorney Bildzog asserting that "There were no agreements reached on November 14." Mr. Hanify then accused Plaintiff and Attorney Bildzog of "walking out" of the closing. [Appendix DD. Attorney Bildzog responded, correcting him, on November 29, 1988. [Appendix DD].

137. At this time, Plaintiff and her attorney were negotiating with COMFED in good faith in a belief that all outstanding matters between the parties could be resolved.

138. On November 30, 1988, while the exchange of letters between Hanify and Bildzog was still in process and without notice to Plaintiff, COMFED began foreclosure proceedings against her in the Essex Superior Court. [Appendix EE].

139. On December 5, 1988 Attorney Hanify wrote to Attorney Bildzog [Appendix DD] stating that:

> Comfed is not interested in proceeding further with negotiations or drafting with you or your clients without an assurance that your clients will (i) execute a release referenced in my letter; (ii) not insist upon a forward commitment as part of the contemplated lending transaction; and (iii) fully identify the nature and purpose of the most recent list of disbursements proposed.

140. COMFED's position as expressed in Mr. Hanify's letter of December 5, 1988 was unreasonable, not made in good faith, was contrary to its previous position upon which Plaintiff had relied to her detriment and only compounded COMFED's refusal to honor its commitment to construction financing made in August of 1987 to Plaintiff.

141. After the attempted closing and thereafter, COMFED told Ainsworth and Litman (and through him Cornell) that the Plaintiff was responsible for the failure of the $175,000 loan to close.

I. CORNELL'S ACTIONS TO RECOVER THE $65,000 FROM THE PLAINTIFF AND COMFED'S REFUSAL TO RETURN THE MONEY

142. On November 29, 1988, pursuant to an order obtained from the Essex Superior Court, Litman, Cornell and Ainsworth drove a truck up to the Plaintiff's home and picked up Plaintiffs' heirlooms.

143. On December 27, 1988 attorney Litman wrote to the Plaintiff and gave her notice that he would sell her personal possessions at auction on January 25, 1989 at 10:00 A.M. [Appendix FF].

144. On January 5, 1989 Plaintiff wrote to Defendant Furey, enclosed a copy of Litman's letter of December 27, 1988, informed him that the sale was of her "personal family heirlooms," and requested that COMFED return the $65,000 to Cornell. [Appendix GG]

145. Plaintiff received no response from COMFED to her letter of January 5, 1988. Plaintiff is informed and believes that to the date of the filing of this Verified Complaint COMFED has not repaid the $65,000 to Cornell or to Litman.

146. On January 24, 1989 the Essex Superior Court restrained the sale of the Plaintiff's personal possessions on condition that Plaintiff pay the costs incurred for the proposed sale and pay current interest on the $65,000. To the date of the filing of this Complaint the Plaintiff is current in her interest payments to Mr. Cornell.

147. At the present time Attorney Litman has possession of Plaintiff's personal belongings.

J. COMFED'S REFUSAL OF A SALE OF THE HOUSE AT 24 MEYER LANE FOR $775,000

148. On January 12, 1989 the Plaintiff, as Seller and John Mammolla and Diane Pollard, buyers, reached an oral agreement on a price for the house and 3 acres of the 24 Meyer Lane Parcel for $775,000, *as is*. The agreement was obviously dependant upon the agreement of Comfed to provide the Plaintiff with a partial release.

149. On January 12, 1989 and January 13, 1989 Plaintiff wrote to Defendant Furey, informed him of the agreement, and

asked that out of the proceeds, she be paid only 10%[3], that Cornell be repaid his $65,000 plus interest; that $19,157.67 of outstanding invoices for work on the project be paid; and by letter of the 13th of January, that $38,750 be held in escrow as indemnification for a possible fee to a broker arising out of the sale. [Appendix HH]

150. Since 1988 the real estate market in Hamilton and surrounding communities has deteriorated progressively.

151. $775,000 for the Meyer Lane property (house and 3 acres) is a reasonable price in the existing market and is an excellent price in light of the fact that the project is in foreclosure by COMFED.

152. On January 23, 1989 Attorney Hanify acting on COMFED's behalf wrote to the Plaintiff's attorney rejecting the sale because "The Bank believes that the price proposed for the house and lot at 24 Meyer Lane, Hamilton of $775,000 is well below market value." [Appendix II] .

153. On February 8, 1989 the Plaintiff responded to Mr. Hanify's letter of January 23, 1989 requesting that he inform her of the price that Comfed would accept [Appendix JJ]. The Plaintiff has received no response to her request.

K. COMFED'S FORECLOSURE OF THE MORTGAGES

154. On February 22, 1989 Comfed served the Plaintiff with notice of its foreclosure action begun the preceding November.

155. Plaintiff is informed and believes that COMFED intends to continue the foreclosure process until the Plaintiffs' property is sold.

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3 Note that the partial release figures worked out by the parties at the November 14; 1988 closing called for the Plaintiff to get 20% of any sale.

L. DAMAGES

156. To date, other than the proposed sale to Mr. Mammola and Ms. Pollard, the Plaintiff has not been able to sell any portion of the "Rock Maple" development. Plaintiff is informed and believes that the reasons for the lack of sales are the inflated value of the project as set out in COMFED's appraisal, COMFED's poor administration of the loan, the fact that COMFED did not provide construction financing and the fact that COMFED has foreclosed and the damage which COMFED caused to the Plaintiff's business reputation.

157. The actions of COMFED increased the costs of the project, caused the Rock Maple project fail and prevented the Plaintiff from making any sales.

158. The actions of COMFED in taking money from Cornell, in reneging on its commitment to provide financing sufficient to repay it, and in not repaying the $65,000 in interest itself, directly lead to the seizure of the Plaintiffs heirlooms and caused the Plaintiff extreme emotional distress.

159. The actions of the COMFED have interfered with the Plaintiff's business relationships with Ainsworth, with Cornell and with various vendors of services whose invoices were not paid or were delayed in payment, and with Mammola and Pollard.

160. The actions of COMFED lead to the Plaintiff's reputation in the business community being destroyed.

161. The actions of Defendants COMFED and Furey induced the Plaintiff to spend approximately 15 months working full time (or more) on the Rock Maple Development. The actions of the Defendants described herein have caused all of that effort to be wasted.

M. LIABILITY OF DEFENDANT FUREY

162. The Commitment Letter, Appendix C, at paragraph 20, purports to release COMFED's officers, including Defendant Furey from personal liability "for any action taken with respect hereto . . . [arising from any] dispute with respite to this commitment or any loan granted pursuant hereto]". However, Plaintiff seeks relief from that release in this action on the basis that this release was obtained based upon fraud, is otherwise unconscionable and, even if otherwise effective, cannot release Defendant Furey from claims made for actions taken by him after the date of the Commitment Letter, August 20, 1987.

163. Plaintiff is now informed and believes that in 1987 COMFED had placed into operation a system in which the job performance and/or compensation of loan officers was dependant upon the dollar figure of the mortgages they obtained for COMFED or the dollar amount of the fees generated for COMFED and in which the sales interests at COMFED so dominated their appraisal system that there was no significant independence to the appraisals and so that appraisals were knowingly or negligently exaggerated so that loans could be granted. These facts were known to COMFED and to Defendant Furey at the time he negotiated the Commitment Letter [Appendix C] and secured the Plaintiffs' signatures thereto. Defendants Furey and COMFED failed to inform the Plaintiffs of these facts prior to the time that they secured the Plaintiffs' signatures on the Commitment Letter. Had the Plaintiffs been informed of these facts they would never have signed the Commitment Letter or would have obtained an independent appraisal to establish an accurate base amount for the loan. Defendants COMFED and Furey had a duty to inform the Plaintiffs of these facts and failed to inform the Plaintiffs of these facts with the intent that the Plaintiffs should rely on the integrity of COMFED's appraisal and construction loan granting process in accepting the loan.

164. The allegations of unconscionability are based on all of the facts surrounding the transaction by which the $1.6 Million loan was applied for and granted described above.

STATEMENT OF CLAIMS

COUNT I BREACH OF CONTRACT RELATING TO THE $1.6 MILLION LOAN (AGAINST DEFENDANTS COMFED)

165. The allegations of paragraphs 1 to 164 above are hereby realleged and incorporated by reference.

166. In addition to the written obligations contained in the loan agreements, COMFED was obliged, by virtue of the obligation of good faith and fair dealing implied in every contract in the Commonwealth to: (1) monitor the loan in a reasonable manner and provide to the Plaintiffs reasonable notice if any situation occurred which placed in doubt the Plaintiffs' ability to pay interest and (2) grant a partial release on reasonable terms to permit a sale of a portion of the mortgaged property to take place.

167. The following actions of Defendants Comfed constitute a breach of its contract with the Plaintiff.relating to the $1.6 Million Loan:

failing to have a good faith bona fide appraisal performed of the property in compliance with the regulations relating to R41C appraisals;

failing to honor its commitment to provide construction financing;

failing to pay upon request of the Plaintiff invoices for services used by the Plaintiff in the subdivision process; paying some of the invoices late and lowering the amount paid on invoices without notifying the Plaintiff causing the Plaintiff's checks to bounce; and refusing to pay some of the invoices;

failing to promptly or fully pay the contractor who, with COMFED'S approval, had performed construction work on the premises;

failing to properly administer the loan by keeping the Service Account separate from the Interest Escrow Account and by failing to give the Plaintiffs reasonable notice that the loan proceeds were being exhausted;

putting the Plaintiffs' loan into default when that default was caused by or substantially contributed to by COMFED;

failing to honor the Plaintiffs' reasonable request for a partial release for a bona fide sale at a reasonable price (a price which would have been in excess of what could be received for the property on a foreclosure sale).

COUNT II SPECIFIC PERFORMANCE OFCONTRACT TO GIVE PARTIAL RELEASES (AGAINST DEFENDANT COMFED SAVING BANK)

168. The allegations of paragraphs 1 to 167 above are hereby realleged and incorporated by reference.

169. Defendant Comfed Savings Bank agreed to give partial releases on reasonable prices to the Plaintiff. This agreement is implied and arises from the obligation of good faith. Defendant Comfed Savings Bank has refused to agree to a reasonable price for the sale of the house at 24 Meyer Lane in breach of its contract.

170. Plaintiff has no adequate remedy at law and will suffer irreparable injury if the Defendant is allowed to breach its contract to provide partial releases.

COUNT III FRAUD IN CONNECTION WITH $1.6 MILLION LOAN AGAINST DEFENDANTS COMFED AND FUREY

171. The allegations of paragraphs 1 to 170 above are hereby realleged and incorporated by reference.

172. In inducing the Plaintiffs to enter into the 1.6 Million loan in reliance on the defective appraisal when COMFED and Furey knew or should have known that the appraisal was defective and not accurate, COMFED and Furey committed a fraud in the inducement to borrow the money and grant the mortgage.

173. In promising Plaintiffs construction financing when in fact COMFED had no intention of being bound to provide construction financing, the Defendants COMFED and Furey committed fraud in the inducement to obtain the loan.

174. In failing to inform the Plaintiffs that Defendant Furey's compensation and job evaluation from COMFED was tied to the dollar amount of mortgages that were obtained by him and in permitting the Plaintiffs to rely on Defendant Furey as their loan officer, the Defendants COMFED and Furey committed a fraud upon the Plaintiffs.

COUNT IV BREACH OF FIDUCIARY DUTY WITH RESPECT TO THE $1.6 MILLION DOLLAR LOAN (AGAINST DEFENDANTS COMFED AND FUREY)

175. The allegations of paragraphs 1 to 174 above are hereby realleged and incorporated by reference.

176. In making representations to the Plaintiffs concerning the bank's expertise in development lending and its appraisal, and in lending money to the Plaintiffs subject to all of the terms and conditions of the various agreements that the Plaintiffs were required to sign, the Defendants COMFED and Furey undertook a fiduciary duty to the Plaintiff.

177. Defendants COMFED engaged in the following breaches of that fiduciary duty:

> granting the Plaintiff the $1.6 million loan which encumbered not only the property at 776 Bay Road (which was being foreclosed) but also the much more valuable property at 24 Meyer Lane (which was *not* subject to foreclosure) when it knew or should have known that the Plaintiff had no ability to pay the loan without construction financing and then failing to grant such construction financing;
>
> putting the Plaintiffs' loan into default for failure to pay interest when, in fact, there had been no default and all of the interest payments were to be made by the Defendants out of escrowed funds;
>
> failing to segregate funds in the different accounts established pursuant to the loan; failing to properly account to the Plaintiffs for the various accounts established by the loan; taking money from the Interest Escrow Account that should have been taken from the Services Account; and
>
> failing in other ways to properly administer the Plaintiffs' loan accounts, including without limitation failing to return Plaintiff's telephone calls, failing to respond to her letters, failing to promptly tell Plaintiffs when the funds set aside for interest were insufficient to pay the expected interest over the life of the loan etc.

COUNT V BREACH OF CONTRACTS RELATING TO THE FORWARD COMMITMENT IN RELATION TO THE PAYMENT OF $65,000 IN INTEREST (AGAINST DEFENDANT COMFED)

178. The allegations of paragraphs 1 to 178 above are hereby realleged and incorporated by reference.

179. The actions of Defendant Comfed in failing to honor its forward commitment constitutes a breach of that commitment.

COUNT VI BREACH OF FIDUCIARY DUTY WITH RESPECT TO THE FORWARD COMMITMENT IN RELATION TO THE PAYMENT OF $65,000 IN INTEREST; CONSTRUCTIVE TRUST (AGAINST DEFENDANTS COMFED AND FUREY)

180. The allegations of paragraphs 1 to 179 above are hereby realleged and incorporated by reference.

181. The actions of the Defendants Comfed in accepting the $65,000 from Mr. Cornell in the circumstances of this case impressed the money with a constructive trust to return it to Cornell if, for any reason, the $175,000 financing did not go through.

182. In failing to agree to construction financing and in placing unreasonable restrictions on the financing that it would grant to the Plaintiff, and in refusing to return the money to Mr. Cornell after negotiations concerning the $175,000 loan broke down, the Defendants COMFED and Furey breached their fiduciary duty to the Plaintiff.

COUNT VII INTERFERENCE WITH ADVANTAGEOUS BUSINESS RELATIONS (AGAINST COMFED AND FUREY)

183. The allegations of paragraphs 1 to 182 above are hereby realleged and incorporated by reference.

184. The failure of COMFED to honor its Commitment to provide the $175,000 loan or, failing that, to repay the $65,000 to Cornell, and then blaming its breach on the Plaintiff interfered with the Plaintiff's advantageous business relationship with Ainsworth and Cornell.

185. The failure of COMFED to honor invoices submitted for its approval under the loan documents, to deposit funds in the Plaintiff's account sufficient to pay the amounts of the invoices, to inform the Plaintiff when it was not going to deposit funds in her account sufficient to pay the amounts requested, interfered with the Plaintiff's advantageous business relationships with her vendors.

186. The unreasonable refusal of COMFED to approve the sale to Mammola and Pollard interfered with the Plaintiff's advantageous relationship with Mammola and Pollard.

187. Defendant Furey is liable, along with COMFED, for all of these actions because they were taken by COMFED acting through him, on his instructions or with his knowledge and assent.

COUNT VIII UNFAIR AND DECEPTIVE TRADE PRACTICES (AGAINST COMFED)

188. The allegations of paragraphs 1 to 187 above are hereby realleged and incorporated by reference.

189. The actions of the Defendants Comfed, all as described herein, constitute unfair and deceptive trade practices in violation of G.L. c. 93A Section 2(a).

COUNT IX INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY PLAINTIFF RHETTA SWEENEY (AGAINST COMFED AND FUREY)

190. The allegations of paragraphs 1 to 189 above are hereby realleged and incorporated by reference.

191. The actions of the Defendant in repeatedly breaching its fiduciary duties to the Plaintiff Rhetta Sweeney in relation to a development project which involved her home and in which her personal possessions had been pledged to secure the $65,000 wrongfully retained by the Defendants Comfed constitute outrageous conduct which should not be tolerated in a free society. WHEREFORE Plaintiffs pray this Court to grant them the following relief:

a. issue a short order of notice requiring Defendant Comfed Savings Bank to appear and show cause why a preliminary injunction should not be entered prohibiting it from foreclosing on the Plaintiff's property at 24 Meyer Lane and 776 Bay Road until this action is finally adjudicated;

b. enter a permanent injunction restraining the Defendant from foreclosing on the Plaintiff's property at 24 Meyer Lane and 776 Bay Road;

c. awarding the Plaintiff her damages, costs, interest and a reasonable attorneys fee;

d. if a reasonable offer of settlement is not made by the Defendants with their answer in this action, award the Plaintiffs double or treble damages pursuant to G.L. c. 93A Section 11 and

e. such other and further relief as this Court deems just and proper.

Plaintiffs Claim trial by Jury as to all Counts triable to a jury.

Plaintiffs by their attorney,

/s/_____

James A. Frieden, Esq.
BBO # 179720
James A. Frieden, Esquire, P.C.
Four Liberty Square, Suite 320
Boston, MA. 02109
Tel. 423-4123

VERIFICATION

I, Rhetta B. Sweeney, hereby certify that all of the statements contained in the above Verified Complaint are true to the best of my knowledge, information and belief.

SIGNED UNDER THE PENALTIES OF PERJURY,

/s/_____	April 14, 1989
RHETTA B. SWEENEY	April 14, 1989

G1

OFFICE OF THRIFT SUPERVISION

Appointment of Conservator
Comfed Savings Bank
Lowell, Massachusetts

Date: 12/13/90

Order No.: 90-3042

The Director of the Office of Thrift Supervision ("OTS"), or his or her designee, in cooperation with the Federal Deposit Insurance Corporation ("FDIC") and the Resolution Trust Corporation ("RTC"), has determined to appoint the RTC as conservator of Comfed Savings Bank, Lowell, Massachusetts (the "Association").

GROUNDS FOR ACTIONS TAKEN IN THIS ORDER:

CONSERVATORSHIP: GROUNDS FOR APPOINTMENT OF RTC AS CONSERVATOR FOR THE ASSOCIATION

The Director, or his or her designee, upon consideration of the administrative record, and for the rationales set forth in the supporting legal and supervisory memoranda contained in the administrative record from various offices within the Office of Thrift Supervision, ("OTS") finds and determines that:

(a) the ASSOCIATION is in an unsafe and unsound condition to transact business due to having substantially insufficient capital in that, as of September 30, 1990, it had negative tangible capital of $78,568,000;

(b) the ASSOCIATION, having incurred losses for eight consecutive quarters, is likely to incur losses that will deplete all or substantially all of its capital, and, due to its poor financial

condition, there is no prospect for replenishment of the ASSOCIATION'S capital without Federal assistance;

(c) there is a violation or violations of laws or regulations, or unsafe or unsound practice or condition which is likely to cause insolvency or substantial dissipation of assets or earning, or is likely to weaken the condition of the ASSOCIATION or otherwise seriously prejudice the interests of depositors, in that unsafe and unsound practices have resulted in large amounts of nonperforming assets which continue to generate losses; and,

(d) the ASSOCIATION has expressly consented to the appointment of a conservator by the OTS pursuant to an executed Consent Agreement dated August 20, 1990.

The Director, or his or her designee, therefore determine that grounds for the appointment of a conservator for the ASSOCIATION exist under Section 5(d)(2) of the Home Owners' Loan Act, as amended ("HOLA").

II. ACTIONS ORDERED OR APPROVED

APPOINTMENT OF A CONSERVATOR FOR THE ASSOCIATION

The Director, or his or her designee, hereby appoints the RTC as conservator for the ASSOCIATION, not for the purpose of liquidation, pursuant to Section 5(d)(2)(B)(H) of the HOLA and Section 11(c)(6)(B) of the FDIA, provided that with respect to an ASSOCIATION which is state-chartered this appointment shall not be effective unless and until compliance with the provisions of Section 5(d)(2(D)(i) of the HOLA.

DELEGATION OF AUTHORITY TO ACT FOR OTS

The Director, or his or her designee, hereby authorizes the Regional or District Director, or his or her designee(s), and the Senior Associate Chief Counsel for the Corporate and Securities Division of the Chief Counsel's Office, or his or her designee(s), to: (1) certify orders; (2) sign, execute, attest or certify other

documents of the OTS issued or authorized by this Order; (3) deliver or accept delivery of any notice from or to the OTS regarding the ASSOCIATION; and (4) perform other functions of the Secretariat to the OTS necessary or appropriate for the implementation of such Orders. All documents to be issued under the authority of this Order must be first approved, in form and content, by the Chief Counsel's Office. In addition, the Director, or his or her designee, hereby authorizes the Senior Associate Chief Counsel for the Corporate and Securities Division, or his or her, designee, to make any subsequent technical corrections, that might be necessary, to this Order, or any documents issued under the authority of this Order.

By Order of the Director of OTS, or his or her designee(s), effective December 13, 1990.

/s/

Jonathan L. Fiechter
Deputy Director for
Washington Operations

G4

Office of Thrift Supervision

[SEAL] Department of the Treasury *Boston Division*

P.O. Box 9010 OMF, Boston, MA 02205-9020
Telephone (617) 542-3979 FAX (617) 439-7707

December 14, 1990

The undersigned hereby certifies that the attached notice of the appointment of the Resolution Trust Corporation as Conservator for ComFed Savings Bank, Lowell, Massachusetts ("Association"), was delivered by the undersigned, pursuant to the authority conferred by Order No. 90-3042, dated December 13, 1990, issued by the Director, Office of Thrift Supervision, to Samuel J. Parks the Executive Vice President/Secretary of the Association at 10:25 a.m., E.S.T. on December 14, 1990.

/s/
Designee, OTS

ATTEST:

/s/

H1

SUPERIOR COURT
CIVIL NO.: 89-2424

Commonwealth of Massachusetts
Department of The Trial Court

MIDDLESEX, ss.

RHETTA B. SWEENEY,
individually and as trustee
of the MAPLE LEAF REALTY TRUST
and of the CANADIAN REALTY
TRUST, and JOHN SWEENEY,

Plaintiffs,

v.

COMFED SAVINGS BANK,
COMFED MORTGAGE COMPANY, INC.,
COMFED ADVISORY COMPANY, INC.
and DENNIS FUREY,

Defendants.

EMERGENCY NOTICE AND MOTION OF RESOLUTION TRUST CORPORATION FOR SUBSTITUTION AS PARTY DEFENDANT

Pursuant to Mass.R.Civ.P. 25, the Resolution Trust Corporation (the "RTC"), in its capacity as Conservator of ComFed Savings Bank ("ComFed"), moves this Court for an Order substituting it in place the corporate defendants, ComFed Savings Bank, ComFed Mortgage Company, Inc, and ComFed Advisory Company, Inc. In support thereof, the RTC states that:

1. The Resolution Trust Corporation ("RTC") is an instrumentality and agency of the United States. 12 U.S.C. § 1441a(b)(1)(B).

1/10/91 Filed in court & after hearing, no action. (Sullivan, J)	1/11/91 Motion allowed (Sullivan, J) NB	1/15/91 After hearing allowance VACATED. Motion allowed as to 'Comfed Savings Bank' ONLY. (Sullivan, J) NB

2. Among the statutory duties of the RTC is the management and resolution of cases involving depository institutions, the accounts of which were insured by the Federal Savings and Loan Insurance Corporation before the enactment on August 9, 1989 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") and for which a conservator or receiver was appointed between January 1, 1989 and August 9, 1989, or for which as conservator is appointed within the three-year period beginning on August 9, 1989. 12 U.S.C. § 1441a(b)(3).

3. Effective December 13, 1990, the Office of Thrift Supervision ("OTS") appointed the RTC as Conservator of ComFed.

4. As a result of its appointment, the RTC by operation of law succeeded to all rights, titles, powers and privileges of ComFed, and of any stockholder, member, account holder, depositor, officer, or director of ComFed with respect to ComFed and its assets, and title to the books, records and assets of any previous conservator or any legal custodian of ComFed. 12 U.S.C. § 1821(d)(2), by reference through 12 U.S.C. § 1441a(b)(4).

WHEREFORE, the RTC in its capacity as Conservator of ComFed requests this Court to grant this Motion and order that the RTC be substituted as a party defendant in place of the corporate ComFed defendants in the above-captioned action.

H3

RESOLUTION TRUST CORPORATION,
In its capacity as Conservator
of COMFED SAVINGS BANK

By its attorneys,

/s/ _____

John D. Hanify
Daniel J. Lyne
David M. McCarthy (BBO# 544187)
HANIFY & KING, P.C.
100 Franklin Street
Boston, MA 02110
(617) 423-0400

DATED: January 7, 1991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH OTHER PARTY BY ~~MAIL~~ HAND ON _____.

/s/ _____

CIVIL ACTION NO. 91-10098WD

United States District Court
District of Massachusetts

RHETTA B. SWEENEY,
individually and as trustee
of the MAPLE LEAF REALTY TRUST
and of the CANADIAN REALTY
TRUST, and JOHN SWEENEY,

Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
in its capacity as Conservator
of COMFED SAVINGS BANK,
COMFED MORTGAGE COMPANY, INC.,
COMFED ADVISORY COMPANY, INC.
and DENNIS FUREY

Defendants.

[SEAL OF U.S.D.C./D. Ma.]

NOTICE OF REMOVAL

Notice is hereby given that the above-captioned action pending in the Superior Court for Middlesex County, Commonwealth of Massachusetts as Civil Action No. 89-2424, is hereby removed to the United States District Court for the District of Massachusetts, based upon the following:

1. The Resolution Trust Corporation ("RTC") as Conservator of ComFed Savings Bank, is removing this action without the need for bond or security pursuant to 12 U.S.C. §

1441a(l)(3) and in accordance with the general removal procedures of 28 U.S.C. 1446 to the extent applicable.

2. Attached hereto is a copy of the Motion for Substitution of the RTC allowed by the Superior Court on January 11, 1991. Certified copies of all papers filed in the State Court, including a certified copy of all docket entries, shall be filed within thirty days of this Notice in accordance with Local Rule 81.1(A).

3. Written notice of removal is being given to all parties and a copy of this Notice of Removal is being filed with the clerk of the aforesaid State Court which shall effect the removal and the State Court, shall proceed no further unless and until the case is remanded, as provided by law.

RESOLUTION TRUST CORPORATION
In its Capacity as Conservator
of COMFED SAVINGS BANK

By its attorney,

/s/ _____

JOHN D. HANIFY (BBO# 219880)
DANIEL J. LYNE (BBO# 309290)
DAVID M. MCCARTHY (BBO# 544187)

HANIFY & KING
Professional Corporation
100 Franklin Street
Boston, MA 02110
(617) 423-0400

DATED: January 11, 1991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE COPY OF THE ABOVE DOCUMENT WAS SERVED UPON THE ATTORNEY OF RECORD FOR EACH OTHER PARTY BY MAIL-HAND ON JANUARY 11, 1991

/s/ _____

AP 450 (Rev. 5/85) Judgment in a Civil Case
CASE NUMBER: CA 91-10098-H

United States District Court
District of Massachusetts

RHETTA B. SWEENEY, individually, and as TRUSTEE of the MAPLE LEAF REALTY TRUST and of the CANADIAN REALTY TRUST; JOHN SWEENEY

v.

RESOLUTION TRUST CORPORATION in its capacity as RECEIVER OF FAILED ASSOCIATION, COMFED SAVINGS BANK, COMFED MORTGAGE COMPANY, INC., COMFED ADVISORY COMPANY, INC., DENNIS FUREY

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

■ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

JUDGMENT IS HEREBY ENTERED FOR DEFENDANTS, RESOLUTION TRUST CORPORATION in its capacity as RECEIVER OF FAILED ASSOCIATION, COMFED SAVINGS BANK, COMFED ADVISORY COMPANY, INC., DENNIS FUREY PURSUANT TO MEMORANDUM AND ORDER ISSUED APRIL 14, 1992.

SO ORDERED.

J2

[SEAL OF UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS]

APRIL 30, 1992
Date

ROBERT J. SMITH, JR.
Clerk

/s/
(By) Deputy Clerk

01970

AP 450 (Rev. 5/85) Judgment in a Civil Case
CASE NUMBER: CA 91-10098-H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SWEENEY, ET AL.,

Plaintiffs,

v.

RESOLUTION TRUST,

Defendant.

ORDER

February 9, 1993

HARRINGTON, D.J.

The Court, having reviewed the below-listed motion, rules as follows:

1. Defendant Resolution Trust's Motion to Amend Judgment Order is denied.

SO ORDERED.

/s/
EDWARD F. HARRINGTON
United States District Judge

K1

103D CONGRESS
1ST SESSION

S.____

IN THE SENATE OF THE UNITED STATES

MR. COHEN introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend the Federal Deposit Insurance Act to clarify provisions intended to protect the Corporation from having bank loans or other assets diluted by secret side agreements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CLARIFICATION.

Section 11(d)(9)(A) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(9)(A)) is amended by striking "any agreement which does not meet the requirements set forth in section 13(e)" and inserting "any agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by the Corporation as security for a loan, by purchase, or as receiver of an insured depository institution, and which does not meet the requirements of section 13(e)."

SEC.2. APPLICABILITY.

Notwithstanding any other provision of law, the amendment made by section 1 shall apply to any claim pending, under judicial review, or on appeal on or after October 1, 1993.

recognition of the importance of such a center, and even in these exceedingly hard economic times, has committed $7 million to this project. To complete the center, and to be able to provide this valuable public health research, Southern University needs Federal assistance. To provide this assistance, I offer a bill to authorize the Secretary of Health and Human Services to award a grant for the creation of this center. This legislation will direct the Secretary to provide a grant to the Louisiana Department of Health and Hospitals for the establishment and construction of the National Center for Sickle Cell Disease Research at Southern University in Baton Rouge.

Mr. President, sickle cell disease is a vital public health problem which this bill would assist in overcoming. Such funding can only aid in the development of this Nation. I urge my colleagues to support this important legislation.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1724

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds that:

(1) Sickle Cell Disease is a serious illness that disproportionately affects African-Americans.

(2) Approximately 1 out of every 12 African-Americans is born with the sickle cell trait, and about 1 out of every 600 is afflicted with Sickle Cell Disease.

(3) Sickle cell conditions also occur in other United States populations, primarily those of Puerto Rican, Cuban, southern Italian ancestry and more recently sickle cell had been found in some Caucasian individuals.

(4) Sickle Cell Disease is a painful and disabling disorder which can lead to untimely death and is caused by inadequate transportation of oxygen due to an abnormal type of hemoglobin molecule in the red blood cells.

(5) Sickle Cell Disease is an inherited disease which can be transmitted to offspring, particularly if both parents carry the genetic trait.

(6) The sickle cell trait carriers show no sign of the disease, but statistically, 1 in 4 of their children will be afflicted with the disease.

(7) There is no national research center devoted to Sickle Cell Disease in the United States.

(8) There is no known cure for Sickle Cell Disease at this time and there is a need for prioritized and specialized research to find such a cure for this severely disabling disease.

(9) Louisiana's minority population is 1,299,281.

(10) Of this number, a suspected 3,248 individuals will have the disease and of those individuals, 25 percent (812 individuals) will have the most acute and serious stage of Sickle Cell Disease, a stage that is usually fatal.

(11) Some 129,928 individuals in Louisiana will carry the sickle cell trait.

(12) Southern University, located in Baton Rouge, Louisiana is the largest predominately African-American university in the United States.

(13) Approximately 16,700 students attend this 112 year old school and Southern graduates are located throughout the United States and the world.

(14) The State of Louisiana through the Louisiana Legislature and Southern University, has shown great leadership and committed significant financial and personnel resources towards the development of a National Center for Sickle Cell Disease Research.

(15) Because Southern University has committed its resources and personnel to seeing this project through to its ultimate goal, finding a cure for Sickle Cell Disease, and because of Southern University's large minority population it is appropriate to locate the National Center for Sickle Cell Disease Research at Southern University in Baton Rouge.

(b) PURPOSE.—It is the purpose of this Act to establish a National Center for Sickle Cell Disease at Southern University in Baton Rouge, Louisiana, that will have the following objectives—

(1) to conduct biomedical research and clinical investigations designed to find a cure for Sickle Cell Disease;

(2) to conduct a wide variety of human behavioral studies designed to provide new knowledge about such issues as the effectiveness of various counseling and education methods, and techniques to improve coping skills on the part of patients and their families;

(3) to establish collaborative arrangements and joint research programs and projects with other Louisiana institutions of higher education, such as Louisiana State University Medical Centers at New Orleans and Shreveport and Tulane University Medical Center to conduct clinical trials on anti-sickling agents;

(4) to provide expanded opportunities for faculty members at the institutions described in paragraph (3) to publish in the three broad areas of basic biomedical research, psychological research and clinical research;

(5) to become a laboratory for training both graduate and undergraduate students in research methods and techniques concerning Sickle Cell Disease; and

(6) to develop, promote and implement joint research projects with other public and private higher education institutions including teaching hospitals on Sickle Cell Disease.

SEC. 2. NATIONAL CENTER FOR SICKLE CELL DISEASE RESEARCH.

(a) GRANT.—The Secretary of Health and Human Services shall award a grant to the Louisiana Department of Health and Hospitals for the establishment and construction of the National Center for Sickle Cell Disease Research at Southern University in Baton Rouge, Louisiana, and for related facilities and equipment at such Center. Prior to the awarding of such grant, the State of Louisiana shall certify to the Secretary—

(1) that the State of Louisiana has provided not less than $7,000,000 to support and operate such Center; and

(2) that the State of Louisiana has developed a plan to provide funds for the continued operation and support of such center.

(b) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated $21,000,000 to carry out the purposes of this Act.•

By Mr. COHEN (for himself, Mr. MACK, Mr. BENNETT, and Mr. FAIRCLOTH):

S. 1725. A bill to amend the Federal Deposit Insurance Act to clarify provisions intended to protect the Corporation from having bank loans or other assets diluted by secret side agreements; to the Committee on Banking, Housing, and Urban Affairs.

D'OENCH DUHME LEGISLATION

• Mr. COHEN. Mr. President, on November 9, the Subcommittee on Oversight of Government Management held a hearing at which the witnesses exposed examples of abuse, incompetence, and mismanagement at the Federal Deposit Insurance Corporation [FDIC].

In general, the subcommittee found that the FDIC's poor mismanagement of its records, delays in decision making and its very institutional culture has resulted in the unnecessary suffering of borrowers, closed businesses, and billions of dollars of loans and real estate being sold for a fraction of their worth.

The FDIC also demonstrates its willingness to complicate and delay during court proceedings. The FDIC's courtroom tactics have drawn deserved criticism from many sources, including Maine's Chief Federal Judge Gene Carter, who described the agency's style of litigation as "confused, obstructionist, inept and uncooperative."

Today, I wish to address yet another example of the callous disregard shown by the FDIC towards the rights of individuals and small businesses throughout the Nation. In my role as ranking Republican of the subcommittee, I have become aware of how the FDIC and the Resolution Trust Corporation [RTC] have systematically used an arcane banking law doctrine known as the "D'Oench Duhme Doctrine" to deny numerous individuals and small businesses their "day in court."

It is time to eliminate the "doom" in "D'Oench Duhme". Today, I am introducing legislation with Senators MACK, BENNETT, and FAIRCLOTH, that would rein in the FDIC and RTC in their use of the doctrine and clarify the right to seek and obtain judicial consideration of cases arising in this narrow banking law context. Once again, the doctrine would only apply where an "asset" of the bank is at issue.

In Ramins & Sons, Inc. versus RTC, Judge Jay Waldman of the Eastern District of Pennsylvania recently commented on how the doctrine is being misapplied, stating: "The doctrine is not a sword to be used to extinguish ordinary commercial obligations of a failed bank because they happen not to be accompanied by a formal agreement. The bank's gardener, window washer and garbage collector have a claim for services rendered whether or not they had a written contract."

It is important to understand the evolution of D'Oench Duhme to clearly see how the FDIC and RTC have been able to use this law to ignore legitimate claims of individuals and small businesses from across the country. In 1942 the U.S. Supreme Court issued a decision in D'Oench Duhme & Co. versus Federal Deposit Insurance Corporation creating this doctrine. The decision stated that if the FDIC took over a failed bank, then in disputes over the bank's assets, the FDIC would be bound only by written agreements contained in the bank's records.

This decision, which is not known as the D'Oench Duhme Doctrine, was later codified by Congress in 1950 and subsequently in 1989 [FIRREA] to provide that only certain written agreements could defeat the interest of the FDIC or RTC in an "asset" held by a bank. The key word here is "asset."

During the debate over the 1989 FIRREA legislation, much thought went into expanding the powers of the FDIC and RTC, which were thought to lack sufficient authority at the time. Apparently, based these recent D'Oench Duhme cases, the pendulum of authority has swung too far in favor of the FDIC and RTC. This imbalance has unintentionally hurt individuals and small businesses and needs to be corrected in a timely fashion.

However, I want to be careful to ensure that the FDIC and RTC maintain the D'Oench Duhme protections as they were originally intended. In its previous form, the doctrine clearly makes sense. The original intent of the D'Oench Duhme Doc-

trine, if interpreted properly, required that if a someone is going to prevail over the FDIC or RTC in an asset dispute, he or she must overcome several procedural hurdles. The statute also requires that in order to prevail over the FDIC or RTC, a party must establish that there was a written agreement concerning the asset at issue and that the agreement was approved by the bank's board of directors or loan committee, entered into the minutes of the board or committee, maintained as an official record of the institution, and executed contemporaneously with the bank's acquisition of the asset.

It now appears that during the past few years, banking regulators and Federal courts have, based on the most recent codification of the D'Oench Duhme Doctrine, have read the word "asset" out of the statute. This has enabled the FDIC, RTC, and the courts to stretch the D'Oench Duhme Doctrine to the extreme, using it to cover not just loans and other assets held by a failed bank, but any liability.

Under the present FDIC and RTC policy, anyone performing services for a bank that failed is barred in some courts from raising legitimate claims against the receiver of the failed bank. Similarly, the doctrine has been used to deny a day in court for innocent third parties having a lawsuit against the bank for negligence or other claims.

The subcommittee has been contacted by a variety of individuals who have their claims against failed institutions dismissed in Federal court without even a hearing on the merits. In each case, the FDIC or RTC relied on the D'Oench Duhme Doctrine—even though an asset of the bank was not directly at issue.

There are many examples of businesses which provided services to a bank that subsequently failed and were denied the opportunity to collect the funds rightly owed them. The only thing standing in their way was the D'Oench Duhme Doctrine.

In Pennsylvania, for example, a general contractor made improvements on a property at the request of the bank that owned the property. This was an oral agreement for about $12,000 worth of work. After the work was done, the bank did not pay the contractor, who was left with no alternative but to go to court to recover his money. The contractor was left with no choice but to fight for the $12,000 in Federal court, where the RTC, acting as the bank's receiver, predictably tried to use the D'Oench Doctrine to avoid paying the claim.

D'Oench Duhme has also made an unwelcome appearance in my home State of Maine. In 1990, a general contractor that had provided labor and materials for construction found itself stymied by the FDIC's misapplication of the D'Oench Duhme Doctrine. The contractor had to fight the FDIC in court to enforce a mechanic's lien and collect the money it was owed. However, because the FDIC's lawyers chose to invoke the D'Oench Duhme Doctrine and protect the agency's own balance sheet, the contractor has had to endure significant legal fees to fight the D'Oench issue. This case is still unresolved.

The application of D'Oench Duhme also has a chilling effect which effectively prevents individuals and small businesses from bringing legitimate claims against that FDIC and RTC. I know that in Maine and throughout the country people who may have legitimate claims are discouraged from ever fighting the FDIC or the RTC because of the high legal costs and the unlikelihood of prevailing in a D'Oench case. For those who have fought D'Oench, it has been an expensive, lengthy and frustrating experience where the legitimacy of the claim rarely is at issue.

Several other examples will illustrate my cause for concern. In a recent Florida case, a small business filed a lawsuit alleging negligence by a national bank. The loan in question had been paid back in full more than 1 year prior to the bank's failure. Therefore, no "asset" was at issue in this lawsuit and

D'Oench Duhme should not have been applied. Nevertheless, the FDIC successfully convinced a Federal court in Miami to dismiss the suit under the D'Oench Duhme Doctrine by arguing that the claim did not meet the procedural hurdles outlined earlier. Adding insult to injury, in this Florida case, the plaintiff had obtained an affidavit from the bank vice president admitting the bank's negligence. But, because the case was dismissed without a hearing on the merits, a judge or jury never had the opportunity to consider the affidavit's contents.

I have also received information concerning D'Oench Duhme cases in which banks have allegedly reneged on agreements to provide crucial funding for small business projects. In a Massachusetts case, a bank terminated the financing for a construction project for unclear reasons, causing the project to collapse. Even though a State judge awarded them $4 million, including damages from the bank's action, the plaintiffs have been caught in a costly bureaucratic nightmare and have been unable to collect from the RTC because of the misapplication of the D'Oench Duhme Doctrine.

Mr. President, when I criticize the misuse of the D'Oench Duhme Doctrine, I am not suggesting that the FDIC and RTC should not be able to use legitimate means to weed out the bad actors and secret sweetheart deals that have occurred. What I am suggesting, however, is that a useful legal tool is being wrongly applied, unfairly penalizing many individuals and small businesses.

The legislation I am introducing today is a technical correction ensuring that the D'Oench Duhme Doctrine applies only in situations where it was originally intended to apply. As the FDIC, RTC, and courts have read the "asset" test out of the statute, this legislation would amend the Federal Deposit Insurance Act to put the "asset" test back in the statute in no uncertain terms. It would still require a party to meet the procedural hurdles enumerated earlier if there is a dispute over an asset such

as the valuation of an outstanding loan. But, it would preclude the FDIC and RTC from relying upon the doctrine to obtain wholesale dismissals of tort and contract claims against failed banking institutions where no underlying asset is at issue.

Under this legislation, a claim against a bank for fraud or negligence could receive a hearing on the merits in court. Similarly, if a window washing company is owed $1,500 by a bank that fails, under this legislation the company could bring an action against the bank and the FDIC could not deny the company a day in court solely because the "agreement" with the bank to perform such services was not approved by the bank's board of directors, entered into the minutes, and so forth. While to the FDIC a $1,500 claim may seem trivial, I assure them that to most small businesses in Maine, it is an amount still worth pursuing.

The rationale for this legislation should be clear. The current interpretation of the D'Oench Duhme Doctrine by the FDIC, RTC, and the courts contradicts the purpose and intent of the statute. Under the current interpretation, if a bank fails and the FDIC steps in, a claim against the bank may be worthless because it isn't based on a written "agreement" approved by the board of directors and kept as an official record. This affects thousands of small businesses that perform services for banks.

The legislation would provide relief in a limited retroactive manner, applying to any claim pending, under judicial review, or on appeal on or after October 1, 1993. Some measure of retroactivity is justified because many individuals and businesses victimized by the FDIC and RTC policy have been denied their due process rights and deserve their day in court.

Mr. President, it is my hope that other Senators will join me in supporting this legislation and working together to eliminate the "doom" in D'Oench Duhme.•

K13

WILLIAM S. COHEN
MAINE

United States Senate

WASHINGTON, DC 20510

October 6, 1993

Dear Colleague:

I am writing to invite you to cosponsor legislation that I intend to offer this week to rectify unintended and harmful effects of a provision in banking law known as the D'Oench Duhme Doctrine.

Let me illustrate how this doctrine hurts small businesses and individuals who may have legitimate claims against failed banking institutions. If a plumber performs work for a savings and loan and the S&L fails, the RTC, after taking over the S&L, may invoke D'Oench Duhme and refuse to honor the claim of the plumber against the failed institution. D'Oench Duhme's application is not just limited to small businesses. For example, if a bank customer had a retirement trust account in a failed bank, and prior to the failure the trustee lost the bulk of the money on inappropriate investments, the FDIC would refuse to recognize the customer's right to due process by invoking D'Oench Duhme. In recent years, courts have upheld the position of the RTC and FDIC in these type of examples.

My legislation will not entirely eliminate this Doctrine — some provisions are rightful protections that must be applied to assets of failed institutions. However, my legislation will eliminate the "doom" in D'Oench Duhme by ensuring that the rights of individuals and small businesses who have legitimate claims against failed banks are protected. At a time when it is difficult to succeed in small businesses, I believe the federal government, as receiver of failed institutions, should recognize and pay the legitimate obligations of these failed institutions.

I hope you will consider cosponsoring this legislation. Additional information is contained in an attachment detailing the legislation. If you are interested in cosponsoring this legislation, please contact me or Paul Brubaker of my staff on 4-5538.

With best wishes, I am,

Sincerely,

/s/

William S. Cohen
United States Senator

Attachment

ATTACHMENT TO SENATOR COHEN'S LETTER

At a time when the public's confidence in government is at an all time low, a current provision of the Financial Institution Reform Recovery and Enforcement Act (FIRREA) allows the Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) to deny the rights of countless small businesses and individuals who attempt to recover legitimate claims against failed banks. The legislation I intend to offer will correct this inequity and restore the rights to those with claims against failed institutions.

This provision of law, known as the D'Oench Duhme doctrine, was created in a 1942 decision by the Supreme Court (D'Oench Duhme & Co. v. Federal Deposit Insurance Corporation). The decision stated that if the FDIC took over a failed bank, then in disputes over the bank's assets, the FDIC would be bound only by written agreements found in the bank's records. The doctrine was later codified by Congress in 1950 and subsequently in the 1989 FIRREA, to provide that only certain written agreements were recognized as those that would defeat the interest of the FDIC or RTC in an "asset" held by a failed institution.

The practical effect of the D'Oench Duhme doctrine is, if interpreted properly, that if someone is going to prevail over the FDIC and RTC in an asset dispute, he or she must overcome several procedural hurdles, including approval of any agreement concerning an asset to be approved by the Board of Directors of the failed bank. However, during the past few years, banking regulators and federal courts have read the "asset" out of the codified D'Oench Duhme statutes. Now the FDIC, RTC and the courts have stretched the D'Oench Duhme Doctrine to the extreme, using it to cover not just loans held by a failed bank, but any existing bill, invoice or liability.

Under the current interpretation of D'Oench Duhme, anyone performing services for a bank that failed is barred in some

courts for raising legitimate claims against the receiver of the failed bank — specifically, the FDIC and RTC. Consequently, the Doctrine has been used to deny a day in court for innocent third parties having a lawsuit against the bank for negligence, breach of fiduciary duty, and breach of contract.

The misapplication of the Doctrine by the FDIC and RTC raises broad due process and government management concerns. In recent months, I have been contacted by a variety of D'Oench victims in Massachusetts, New York, Florida and other states who have had their claims against failed institutions dismissed without even a hearing on the merits. In no case was an "asset" of the failed institution an issue.

I am not suggesting that the FDIC and RTC should not be able to use legitimate means to weed out the bad actors and sweetheart deals that have occurred. What I am suggesting, however, is that a useful legal tool is being wrongly applied, unfairly penalizing many individuals and small businesses. Anyone who is a potential creditor of a bank is at risk under the current FDIC and RTC policy. We owe it to our constituents to protect them, just as we have provided enhanced safeguards to depositors.

The legislation I intend to introduce would accomplish this objective by ensuring that the D'Oench Duhme Doctrine applies only in situations where it was originally intended to apply. This legislation would amend the Federal Deposit Insurance Act to put the "asset" test back in the statute in no uncertain terms. It would still require a party to meet the procedural hurdles discussed earlier if there is a dispute over an asset such as the valuation of an outstanding loan. But, it would preclude the FDIC and RTC from relying upon the Doctrine to obtain wholesale dismissals of tort and contract claims against failed banking institutions where no underlying asset is at issue.

Under this legislation, a claim against an bank for fraud, negligence, or breach of contract could once again receive a

hearing on the merits in court. Essentially, this legislation is a technical correction made necessary by the misinterpretation and misapplication of the language added to the D'Oench Duhme statute by FIRREA. By clarifying that the Doctrine only applies to assets held by a bank, Congress will be restoring the right of creditors of failed institutions to pursue their claims.

This legislation would provide relief in a limited retroactive manner, and would apply to any claim pending under judicial review, or on appeal on or after October 1, 1993. Some measure of retroactivity is justified because many of the individuals and businesses victimized by the FDIC and RTC policy have been denied their due process rights and deserve their day in court. It is important to note that this legislation does not confer a new right, but rather ensures that an existing right may be exercised.

SUMMARY OF EXISTING D'OENCH DUHME LAW

1950 Provision

- Congress first codified the D'Oench Duhme Doctrine in 1950, establishing procedural hurdles that must be met by anyone contesting the FDIC's interest in an "asset" of a bank, such as an outstanding loan. This provision is codified at 12 U.S.C. § 1823(e).

1950-1989

- During the period between 1950 and 1989, many federal courts held that Section 1823(e) *could not* be used by the FDIC when bank customers with outstanding loans beat the FDIC to court and filed suit against the FDIC for cancellation of their loans based on the existence of a secret agreement with the failed institution.

FIRREA Provision

- The D'Oench Duhme language in FIRREA added Section 1821(d)(9)(A), which made clear that the FDIC *could* use Section 1823(e), even when the debtor sued first. This was designed to protect the FDIC and expand its authority as a receiver for failed institutions.
- The new FIRREA provision provided that only agreements between banks and customers meeting "the requirements set forth in section 1823(e) shall...form the basis of... a claim" against the FDIC. In other words, the FIRREA provision was intended to incorporate all the requirements of the 1950 provision.

The Problem

- The current issue has arisen because in drafting the new Section 1821(d)(9)(A), Congress failed to specify that *all* the requirements of Section 1823(e) must be met for the FDIC to use its new power - *including the fact that an "asset" of the bank must be involved for D'Oench Duhme to apply at all.*

- As a result, some courts have said that FIRREA'S failure to include the term "asset" in Section 1821(d)(9)(A) reflects a Congressional intent to grant the FDIC "super powers," i.e., the power to defeat *all* claims, whether linked to an asset or not.
- The courts' interpretations have meant that numerous individuals and small businesses with claims against failed banks for breach of fiduciary duty, fraud, misrepresentation, and breach of contract have been denied their day in court.

K20

103D CONGRESS
2D SESSION

H.R._____

IN THE HOUSE OF REPRESENTATIVES

Mr. McCollum introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Federal Deposit Insurance Act to clarify provisions intended to protect the Corporation from having bank loans or other assets diluted by secret side agreements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CLARIFICATION.

Section 11(d)(9)(A) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(9)(A)) is amended by striking "any agreement which does not meet the requirements set forth in section 13(e)" and inserting "any agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by the Corporation as security for a loan, by purchase, or as receiver of an insured depository institution, and which does not meet the requirements of section 13(e).".

SEC.2. APPLICABILITY.

Notwithstanding any other provision of law, the amendment made by section 1 shall apply to any claim pending, under judicial review, or on appeal on or after October 1, 1993.

STATEMENT OF THE HONORABLE BILL MCCOLLUM ON D'OENCH DUHME CLARIFICATION ACT

Mr. Speaker, today my colleagues and I are introducing legislation to clarify what is known as the D'Oench Duhme doctrine in order to allow individuals that perform services for banks and other innocent third parties to raise claims against the receivers of failed banks. This is not a major piece of legislation, but it will provide for a small measure of justice for individuals that have legitimate claims.

In the 1942 Supreme Court case *D'Oench Duhme and Co. v FDIC*, the Court held that in disputes over a failed bank's assets, the FDIC was only bound by written agreements contained in the bank's records. This decision was first codified in federal statutory law in 1950. It was subsequently modified in the savings and loan legislation of 1989. Unfortunately, the 1989 changes did not specify that an "asset" of the bank must be involved for the doctrine to apply. This has caused a number of individuals and small businesses (with valid claims against failed banks for breach of fiduciary duty, fraud, and breach of contract) to be denied their day in court.

This bill will restore the law to its original intent and ensure that the D'Oench Duhme doctrine would apply only in situations where Congress originally intended it to apply. This is accomplished by putting the "asset" test back into the statute. Individuals with valid tort claims would once again be allowed to have a hearing on the merits of their cases rather than face peremptory dismissals based on FDIC/RTC motions.

I am sure that the regulatory agencies affected by this bill will oppose its enactment. I can foresee a great hue and cry from the FDIC and the RTC complaining that this legislation will hamper their ability to limit insurance fund losses in failed institutions. Since 1989 these agencies have been given enhanced powers in litigating causes of action relating to failed

financial institutions. In my opinion, these powers have been abused — especially in cases against bank directors and officers. Another example of regulatory zeal is the use of the 1989 statute by agencies to urge the dismissal of good-faith claims against receiverships even when there is no "asset" in question. The following five cases are examples of why the asset requirement needs to be put back in the law:

1. *Hawke Associates v. City Federal Savings Bank*, 787 F. Supp. 423 (D.N.J. 1991).

The landlord entered into an agreement with City Federal Savings Bank for the lease of additional space in the building on favorable terms, in return for the a bank's commitment to continue to occupy its existing space. Shortly after the lease was signed, the landlord sued the bank for damages, alleging that the bank had breached the lease by (1) engaging in fraudulent conduct and (2) making misrepresentations during the lease negotiations. However, before the case was heard by the court, the government determined that the Bank was insolvent, and the RTC was appointed receiver of the institution. Citing the D'Oench Duhme statute, 12 U.S.C. Sections 1821(d)(9)(A) and 1823(e), but disregarding the asset requirement, the court held that the bank's alleged lease with the landlord was not enforceable against the RTC because the lease would tend to diminish or defeat "the interest" of the RTC.

2. *Bell & Murphy and Associates, Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990).

Bell & Murphy, a company in the oil and gas industry, sought financial assistance from First Republic Bank Dallas, N.A. in the mid-1980s. Under the terms of an agreement embodied in a letter from a Republic loan officer to Bell & Murphy, the bank agreed to extend financing, but only if the company surrendered to the bank as security for the loan its account receivables and funds from its pension and profit shar-

ing plans. Several years later, Bell & Murphy filed suit against the bank, alleging that the bank breached the agreement after intentionally inducing the company to surrender its assets. Interfirst Bank failed shortly thereafter, and the FDIC was appointed receiver. Relying upon the federal common law *D'Oench* doctrine, the court dismissed Bell & Murphy's claims against the FDIC as receiver for the institution, despite the fact that the FDIC had not actually acquired an asset.

3. *Hall v. FDIC*, 920 F.2d 334 (6th Circuit 1990), *cert. denied*, 111 S. Ct. 2852 (1991).

A group of borrowers and investors sued Commerce Federal Savings and Loan Association for breach of a loan agreement under which Commerce allegedly agreed to fund a secured loan. FSLIC, which was appointed receiver of Commerce when the institution failed, defended its failure to fund and argued that the plaintiffs' claims were barred by 12 U.S.C. Section 1823(e) and the federal common law *D'Oench* doctrine. The Sixth Circuit agreed with the FSLIC, noting, in dictum, that "the logic of *D'Oench* should still apply to protect" the government even when the government does not have an interest in an asset.

4. *McCaugherty v. Sifferman*, 772 F. Supp. 1128 (N.D. Cal. 1991).

The claims of the partners in a limited partnership were barred in *D'Oench* in this case. The partners purchased securities from Farmers Savings. The partners subsequently filed an action against Farmers, citing misstatements by Farmers concerning the existence of other bidders for the securities and alleging "causes of action for fraud, negligence, misrepresentations, and violations of the federal and state securities laws." Among other forms of relief, the partners sought recovery of damages from the receivership estate. The court ruled that the plaintiffs' damages claims, though not related to any specific asset, were barred by 12 U.S.C. Sections 1821 (d)(9)(A), 1823(e) and the federal common law *D'Oench* doctrine: "the

"*D'Oench* doctrine applies even where the unrecorded agreement at issue is wholly-unrelated to any specific monetary obligation of the bank, but is merely asserted to recover damages."

5. *Bowen v. FDIC*, 915 F. 2d 1013 (5th Cir. 1990).

The shareholders of a corporation sued First Republic Bank-El Paso for its failure to fund a loan which, according to plaintiffs, the bank had orally agreed to fund. In reversing the district court judgment for the plaintiffs, the Fifth Circuit applied the federal common law *D'Oench* doctrine, thereby barring the plaintiffs' assertion of an unrecorded loan commitment. Recognizing that *D'Oench* had evolved to a "rule that today is expansive and perhaps startling in its severity," the court nevertheless concluded the *D'Oench* applies even when the FDIC has not acquired an asset.

The regulatory agencies, like any powerful bureaucracy, will complain that this legislation will inhibit their efforts to recover assets in failed banks. In the interest of justice, however, good-faith claimants at least deserve their day in court, which is what this bill will provide.

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

JOHN G. O'BRIEN,

Plaintiff,

v.

COMFED SAVINGS BANK, *et al.*

Defendants.

SUPERIOR COURT DEPARTMENT
C.A. No. 91-1438

ANSWER TO COMPLAINT

91-12437WD

ComFed Savings Bank, COMFED Mortgage Co., Inc. and Resolution Trust Corporation, as Receiver of ComFed Savings Bank, answer the complaint as follows:

ComFed Savings Bank is a named defendant. On December 14, 1990, the Resolution Trust Corporation ("RTC") was appointed Conservator of ComFed Savings Bank. On February 1, 1991, the Director of the Office of Thrift Supervision, Department of the Treasury, closed ComFed Savings Bank, and the RTC was appointed Receiver of ComFed Savings Bank. This answer is filed by the RTC as Receiver of ComFed Savings Bank in its capacity as such on behalf of defendant Comfed Savings Bank as well as on its own behalf, and a motion will be filed to substitute the RTC as Receiver of Comfed Savings Bank, in place of ComFed Savings Bank as defendant.

1. They are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 1 of the complaint.

2. Denied. As stated above, on February 1, 1991, ComFed Savings Bank was closed, the RTC was appointed Receiver of ComFed Savings Bank, and the RTC as receiver took possession of all of the assets of ComFed Savings Bank.

3. It admits COMFED Mortgage Co., Inc. was a subsidiary of ComFed Savings Bank as alleged.

4. It admits that the RTC, as Receiver, is successor in interest to ComFed Savings Bank, but not to COMFED Mortgage Co., Inc.

5. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint.

6. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint.

7. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.

8. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint.

9. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint.

10. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the complaint.

11. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

12. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the complaint.

13. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the complaint.

15. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the complaint.

16. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the complaint.

17. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the complaint.

18. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the complaint.

19. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the complaint.

20. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the complaint.

21. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the complaint.

22. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the complaint.

23. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the complaint.

24. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the complaint, except that they state that the closing documents do indicate the existence of a second mortgage.

25. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the complaint, except that they admit that a quality control review form was sent from ComFed Savings Bank to Mr. Blais.

26. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the complaint.

27. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the complaint.

28. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the complaint.

29. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29 of the complaint.

30. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the complaint.

31. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the complaint.

32. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 32 of the complaint.

33. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of the complaint.

34. They are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 of the complaint.

35. They admit that ComFed Savings Bank received the demand letter attached as part of Exhibit D.

COUNT I

36-39. The allegations in paragraphs 36 through 39 are directed toward another defendant and need not be answered by these defendants.

COUNT II

40-43. The allegations contained in paragraphs 40 through 43 are directed toward another defendant and need not be answered by these defendants.

COUNT III

44-47. The allegations contained in paragraphs 44 through 47 are directed toward another defendant and need not be answered by these defendants.

COUNT IV

48. They repeat and reallege each and every response to the allegations contained in 1 through 47 of the complaint herein.

49. They state that the legal duties and obligations arising out of the relationship, if any, between them and plaintiff are a conclusion of law and need not be responded to in this complaint.

50. Denied.

COUNT V

51-54. The allegations contained in paragraphs 51 through 54 are directed toward another defendant and need not be answered by these defendants.

COUNT VI

55-58. The allegations contained in paragraphs 55 through 58 are directed toward another defendant and need not be answered by these defendants.

COUNT VII

59. They repeat and reallege each and every response to the allegations contained in 1 through 58 of the complaint herein.

60. Admitted, other than with respect to the involvement of the RTC as Receiver or Conservator of ComFed.

61. Denied.

62. Denied.

63. Denied.

COUNT VIII

64-68. The allegations contained in paragraphs 64 through 68 are directed toward another defendant and need not be answered by these defendants.

COUNT IX

69-73. The allegations contained in paragraphs 69 through 73 are directed toward another defendant and need not be answered by these defendants.

COUNT X

74-78. The allegations contained in paragraphs 74 through 78 are directed toward another defendant and need not be answered by these defendants.

COUNT XI

79-83. The allegations contained in paragraphs 79 through 83 are directed toward another defendant and need not be answered by these defendants.

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim upon which relief may be granted.

2. The RTC as Receiver of ComFed Savings Bank pleads all statutory or common law defenses available to it in its capacity as Receiver, including those pursuant to *D'Oeuch Duhme*, 12 U.S.C. § 1823(e), the holder in due course doctrine and all other affirmative defenses.

3. Defendants plead the affirmative defense of accord and satisfaction.

4. Defendants plead the affirmative defense of the statute of limitations.

5. Defendants plead the affirmative defense of the statute of frauds.

6. Defendants plead the affirmative defense of unclean hands on the part of plaintiff.

7. Defendants plead the affirmative defense of lack of subject matter jurisdiction pursuant to 1821(d)(12).

WHEREFORE, said defendants respectfully request that the complaint be dismissed and for their costs and reasonable attorneys' fees.

L8

COMFED SAVINGS BANK
COMFED MORTGAGE CO., INC. and
RESOLUTION TRUST COMPANY

By Their Attorneys,

PARTRIDGE, SNOW & HAHN

/s/ _____
James E. Purcell
BBO #545439
180 South Main Street
Providence, RI 02903
(401) 861-8200

CERTIFICATION

I hereby certify that on this 16th day of May, 1991, I mailed a true and accurate copy of the within Answer to Jane M. Owens Triano, PHILLIPS, GERSTEIN & HOLBER, 25 Kenoza Avenue, PO Box 909, Haverhill, MA 01830.

/s/ _____

Supreme Court, U.S.
FILED
JUL 22 1994
OFFICE OF THE CLERK

(2)

No. 93-1782

In the Supreme Court of the United States

OCTOBER TERM, 1994

RHETTA B. SWEENEY, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

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1908

QUESTIONS PRESENTED

1. Whether 12 U.S.C. 1823(e) (Supp. IV 1992) and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), apply to bar petitioners' claims under a Massachusetts consumer protection statute against a failed depository institution and its wholly owned subsidiaries.

2. Whether the court of appeals correctly upheld removal of this case by the RTC to the local federal district court under the general federal removal statute, 28 U.S.C. 1441(a), rather than under the special removal provisions of 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), as in effect at the time of removal.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Astrup v. *Midwest Federal Sav. Bank*, 886 F.2d 1057 (8th Cir. 1989)	9, 12
Becherer v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 799 F. Supp. 755 (E.D. Mich. 1992)	12
Beighley v. *FDIC*, 868 F.2d 776 (5th Cir. 1989)	10
Clay v. *FDIC*, 934 F.2d 69 (5th Cir. 1991)	10
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	5, 6, 11, 12
Garrett v. *Commonwealth Mortgage Co.*, 938 F.2d 591 (5th Cir. 1991)	6, 9, 10
Glenborough New Mexico Assocs. v. *RTC*, 802 F. Supp. 387 (D.N.M. 1992)	12
Hanson v. *FDIC*, 13 F.3d 1247 (8th Cir. 1994)	6, 9
Hellon & Assocs. v. *Phoenix Resort Corp.*, 958 F.2d 295 (9th Cir. 1992)	13-14
Kilpatrick v. *Riddle*, 907 F.2d 1523 (5th Cir. 1990), cert. denied, 498 U.S. 1083 (1991)	8
Langley v. *FDIC*, 484 U.S. 86 (1987)	8
Martin-Trigona v. *Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575 (7th Cir. 1989)	6
Montalvo Santiago v. *RTC*, 779 F. Supp. 632 (D.P.R. 1991)	14
OPS Shopping Center, Inc. v. *FDIC*, 992 F.2d 306 (11th Cir. 1993)	10, 11
Oliver v. *RTC*, 955 F.2d 583 (8th Cir. 1992)	9, 12

Cases–Continued: Page

RTC v. *Lightfoot*, 938 F.2d 65 (7th Cir. 1991) 14
RTC v. *Sloan*, 775 F. Supp. 326 (E.D. Ark. 1991) 14
RTC v. *Westgate Partners, Ltd.*, 937 F.2d 526 (10th Cir. 1991) 14
Sunchase Apts. v. *Sunbelt Serv. Corp.*, 596 So. 2d 119 (Fla. Dist. Ct. App. 1992) 12
Timberland Design v. *First Service Bank for Sav.*, 932 F.2d 46 (1st Cir. 1991) 9
Vernon v. *FDIC*, 981 F.2d 1230 (11th Cir. 1993) 6, 10, 11
Vernon v. *RTC*, 907 F.2d 1101 (11th Cir. 1990) 10
Victor Hotel Corp. v. *FCA Mortgage Corp.*, 928 F.2d 1077 (11th Cir. 1991) 12, 13

Statutes, regulations and rule:

11 U.S.C. 362 (1988 & Supp. IV 1992) 6
12 U.S.C. 1441a(*l*)(3) (Supp. II 1990) 4, 13, 14
12 U.S.C. 1821(d)(2) (Supp. IV 1992) 12
12 U.S.C. 1821(d)(9)(A) (Supp. IV 1992) 5, 8
12 U.S.C. 1823(e) (Supp. IV 1992) 5, 6, 7, 8, 9, 10, 11, 12
28 U.S.C. 1441(a) 4, 13, 14
Mass. Gen. L. ch. 93A, (1984) 6, 7
2(a) 2
12 C.F.R. 545.32 (1992) 5, 7
Fed. R. Civ. P. 11 5

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1782

RHETTA B. SWEENEY, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 16 F.3d 1. The opinion of the district court on the merits (Pet. App. B1-B7) is unreported. The opinion of the district court on petitioners' motion to remand the case to state court (Pet. App. C1-C5) is reported at 765 F. Supp. 33.

JURISDICTION

The judgment of the court of appeals (Pet. App. D1) was entered on January 31, 1994. A petition for rehearing was denied on March 17, 1994. Pet. App. E1. The petition for a writ of certiorari was filed on May 2,

1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August, 1987, petitioners borrowed $1.6 million from ComFed Savings Bank. Pet. App. A2. The loan documents, which included a promissory note and two loan agreements specifying how the loan proceeds were to be disbursed, were executed a few days before another lender was scheduled to foreclose on property owned by petitioners. *Id.* at A2, F8 (¶ 27). Petitioners used a substantial portion of the loan proceeds to pay off prior liens and prevent the threatened foreclosure. *Id.* at F10 (¶ 37b).

Petitioners defaulted on the loan, and in November, 1988, ComFed Savings began its own foreclosure proceedings. Pet. App. A2. In April, 1989, petitioners filed a nine count complaint in Massachusetts state court against ComFed Savings and its wholly owned subsidiaries ComFed Mortgage Advisory Company and ComFed Mortgage Company (collectively, ComFed), and against an employee of ComFed Mortgage. *Ibid.* The complaint alleged (see *id.* at F37-F43) breach of contract, fraud, breach of fiduciary duty, interference with advantageous business relations, intentional infliction of emotional distress, and violation of a state statute that prohibits "[u]nfair methods of competition and unfair or deceptive practices in the conduct of any trade or commerce." Mass. Gen. L. ch. 93A, § 2(a) (1984). ComFed filed a counterclaim against petitioners for failure to repay the note. Pet. App. A2.

In early 1990, the state court conducted a twelve-day jury trial of most of petitioners' claims and ComFed's counterclaim, reserving for itself consideration of petitioners' claims for specific performance and for

violation of the state consumer fraud statute. Pet. App. A2-A3. In March of that year the jury awarded ComFed $2,069,586.33 for petitioners' breach of the note. The jury awarded petitioner Rhetta Sweeney $65,000 for intentional infliction of emotional distress, but found for respondents on petitioners' claims of breach of contract, fraud, and interference with advantageous relations.[1] *Ibid.* The state court withheld entry of judgment on the jury's verdict pending the court's ruling on petitioners' remaining claims. *Id.* at A3.

2. On December 13, 1990, the Office of Thrift Supervision appointed respondent Resolution Trust Corporation (RTC) conservator of ComFed.[2] Pet. App. A3, G1. On January 11, 1991, the RTC was substituted for ComFed in the state court action, and immediately removed the case to the United States District Court for the District of Massachusetts. Pet. App. A3; *id.* at H1-H3, I1-I3. On January 30, 1991, 19 days after removal, the state court purported to enter findings and rulings on the remaining counts of petitioners' complaint (those tried to the court rather than to the jury). *Id.* at A3.

On March 1, 1991, petitioners moved to remand the case to the state court. Pet. App. A3-A4. The district court denied that motion (which petitioners renewed on two later occasions), holding that petitioners' objection related to venue rather than jurisdiction, and that it was untimely because it was made more than 30 days after

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[1] Petitioners waived two counts (which alleged breach of fiduciary duties) before the case was submitted to the jury. Pet. App. B2 n.2.

[2] The RTC was subsequently appointed receiver of ComFed and of ComFed Savings Bank, F.A., to which many of ComFed's assets were transferred as part of the reorganization following ComFed's failure. See Pet. App. A3 n.1.

removal. *Id.* at C4-C5. The court subsequently entered judgment in accordance with the state jury's verdict, but ruled that once the case had been removed to federal court, the state court had no further authority to decide the counts that had not been tried to the jury. *Id.* at B4. After briefing and argument, the district court granted summary judgment to the RTC on those counts. *Id.* at B1-B7.

3. The court of appeals affirmed. Pet. App. A1-A12. The court first rejected (*id.* at A4-A6 & n.4) petitioners' contention that the case should have been remanded to the state trial court on venue grounds. Even assuming, as petitioners argued, both that the special RTC removal statute then in effect (12 U.S.C. 1441a(*l*)(3) (Supp. II 1990)) provided for removal only to the District Court for the District of Columbia and that the time limit for petitioners' motion to remand should have been equitably tolled, the court held that the case was properly removed to the District Court for the District of Massachusetts under the general removal statute, 28 U.S.C. 1441(a). Pet. App. A5-A6.

In addition, the court upheld the district court's decision, after removal, to enter judgment in accordance with the jury's verdict on those counts that were tried to the jury, but not to adopt the state court's purported judgment on petitioners' remaining claims. Pet. App. A6, A9-A10. Because removal completely terminated the state court's jurisdiction over the case, that court's purported post-removal judgment was void. *Id.* at A6. And because the district court resolved the remaining claims against petitioners "as a matter of law and on the basis of federal defenses which arose only after the trial," the fact that those claims were not resolved by the same court that heard the evidence at trial caused no prejudice to petitioners. *Id.* at A10.

On the merits of petitioners' state consumer fraud claim, the court of appeals noted that petitioners' "principal claim" was that "the closing loan documents * * * led [petitioners] to understand that ComFed would provide them with construction financing in addition to the $1,600,000 loan actually provided." Pet. App. A7. Because that claim was "premised on an unwritten agreement" by the bank to provide additional financing (*ibid.*), the court determined that it was barred by the doctrine that any collateral agreement tending to diminish the value of a failed thrift's assets may not be asserted against the RTC unless it is in writing (and meets various other requirements). *Ibid.*, citing 12 U.S.C. 1823(e) (Supp. IV 1992) and *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942); see also 12 U.S.C. 1821(d)(9)(A) (Supp. IV 1992). The court also rejected (Pet. App. A9) petitioners' contention that ComFed's alleged violation of its own loan-to-value ratio limitations, and hence of 12 C.F.R. 545.32 (1992), in connection with their loan violated the state consumer fraud statute. Noting that Section 545.32 was intended to protect depositors, federal deposit insurance funds, and taxpayers, not consumers of bank loans, the court found "no authority" for the proposition that petitioners' allegations stated a claim under state law. Pet. App. A9.

The court of appeals considered and rejected a variety of other claims raised by petitioners. Pet. App. A11. The court also upheld the district court's decision granting the RTC's request, under Fed. R. Civ. P. 11, for attorneys' fees incurred in connection with responding to petitioners' third motion to remand the case to state court.[3] Pet. App. A12.

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[3] We are informed that on July 14, 1994, petitioner Rhetta Sweeney filed a petition for bankruptcy in the United States

ARGUMENT

1. Petitioners contend (Pet. 11-13) that the court of appeals' decision affirming summary judgment on their state-law consumer fraud claim conflicts with decisions of the Fifth, Eighth and Eleventh Circuits. Those decisions hold that 12 U.S.C. 1823(e) (Supp. IV 1992) and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), do not bar tort actions against the RTC (or FDIC), as receiver, when the tort claim is "wholly independent of any agreement" between the claimant and the failed institution, or otherwise unrelated to the institution's regular banking transactions. *Hanson* v. *FDIC*, 13 F.3d 1247, 1252 (8th Cir. 1994); see also *Garrett* v. *Commonwealth Mortgage Co.*, 938 F.2d 591, 594-595 (5th Cir. 1991); *Vernon* v. *FDIC*, 981 F.2d 1230, 1233-1234 (11th Cir. 1993). The court of appeals determined, however, that petitioners' claim under Mass. Gen. L. ch. 93A was "premised on an unwritten agreement" by ComFed to provide petitioners with construction financing in addition to the $1.6 million loan, made in the ordinary course of business, on which petitioners ultimately defaulted.[4] Pet. App. A7-A8. The court's rejection of petitioners' claim on that basis represents a routine

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Bankruptcy Court for the District of Massachusetts (No. 94-14,683). The automatic stay imposed by that petition, see 11 U.S.C. 362 (1988 & Supp. IV 1992), does not affect proceedings in this case because this action is one brought by, rather than against, the debtor. See *Martin-Trigona* v. *Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577-578 (7th Cir. 1989).

[4] The court also rejected (Pet. App. A8-A9) the argument that ComFed's alleged violation of its own loan-to-value limitations, and therefore of 12 C.F.R. 545.32 (1992), stated a cause of action for consumer fraud under Mass. Gen. L. ch. 93A. Petitioners do not renew that argument in this Court.

application of Section 1823(e) and *D'Oench, Duhme*, and does not conflict with the decisions cited by petitioners.

Petitioners argue (Pet. 9-10) that their claim under Mass. Gen. L. ch. 93A "do[es] not turn on the validity of any agreement with the insured depository institution," but rather "allege[s] other wrongful conduct" by ComFed amounting to a state statutory tort, independent of "any agreement, written or otherwise," between petitioners and ComFed. That argument is inconsistent with the emphasis petitioners placed in the courts below on the alleged existence of an explicit agreement by ComFed to provide construction financing. See, *e.g.*, Pet. App. F9 (¶ 29), F12-F13 (¶¶ 44-45), F16 (¶ 63), F21 (¶ 89), F37-F42 (complaint); Pls. Opp. to Mot. to Dismiss (Mass. Super. Ct.) 3 ("The Verified Complaint clearly alleges that the boilerplate in Comfed's loan documentation did not reflect the complete agreement of the parties to fully fund construction after subdivision of the lots."), 5 ("The Plaintiffs' claims thus involve a contract which failed to include all the terms of the parties' agreement."), 10-11 ("the 'future promise' [to provide construction financing] * * * was not future or contingent at all, but rather an integral part of the parties' overall deal"); Pls. Mem. of Law in Opp. to RTC's Mot. for Entry of Judgment, etc. (D. Mass.) 15, 16 ("The Construction Loan documents themselves evidence the *written agreements* between the parties to provide future construction financing."), 18; Pet. C.A. Br. 52 ("The 'Loan Agreement' and 'Construction Loan Agreement' on their face * * * bespeak a clear promise to advance construction funding."); see also Pet. 11 n.1. In any event, a central purpose of 12 U.S.C. 1823(e) and *D'Oench, Duhme* is to protect federal deposit insurers from latent claims that arise out of an institution's loan activities and impair the value of its portfolio, but are not

apparent from the relevant documentation maintained in the institution's records. See, *e.g.*, *Langley* v. *FDIC*, 484 U.S. 86, 91-93 (1987). The court of appeals' determination (Pet. App. A7-A9) that petitioners' state statutory claim came within the scope of that protection was reasonable, and merits no further review.[5]

The determination that petitioners' consumer fraud claim was "premised on an unwritten agreement" (see Pet. App. A7) for purposes of analysis under Section

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[5] Petitioners' contentions in the lower courts (and perhaps in this Court, see Pet. 11 n.1) might be construed as alternative arguments: ComFed agreed to provide additional construction financing, but if it did not, then it misled petitioners into thinking that it would. That is not the most natural reading of petitioners' complaint, which is phrased in cumulative rather than alternative terms. Pet. App. F42 (¶¶ 188-189). Even so construed, however, petitioners' argument amounts to no more than a claim of fraud in the inducement (compare *id.* at F39 (¶ 173)), which is plainly barred under Section 1823(e). *Langley*, 484 U.S. at 93-94. Petitioners have abandoned, in this Court, their previous contention (Pet. C.A. Br. 38-40) that the conduct underlying their consumer fraud claim constituted "fraud in the factum," which *Langley* suggests (484 U.S. at 93-94) might defeat application of Section 1823(e). Indeed, the petition stresses (at 10, 15) the validity and enforceability of the $1.6 million loan. Petitioners now advocate a result under which they would repay the loan, but the repayment would be more than offset by the proceeds of a fraud judgment against ComFed. That fraud judgment would be based on alleged misrepresentations of ComFed's intent to enter into exactly the same sort of side agreement to provide further financing that petitioners now concede (*ibid.*) could not be enforced unless it met the requirements of Section 1823(e) and *D'Oench, Duhme.* The practical distinction between that result and a prohibited "impairment" of the the $1.6 million loan is elusive at best. Compare 12 U.S.C. 1821(d)(9)(A) (Supp. IV 1992) (extending terms of Section 1823(e) to affirmative claims against the RTC as receiver); *Kilpatrick* v. *Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990) cert. denied, 498 U.S. 1083 (1991).

1823(e) and *D'Oench, Duhme* also disposes of the contention that the decision below conflicts with other appellate decisions. Petitioners first cite (Pet. 11-12) *Astrup* v. *Midwest Federal Sav. Bank*, 886 F.2d 1057 (8th Cir. 1989), which upheld a judgment for breach of fiduciary duty against a subsidiary of a failed thrift. As its subsequent cases have made clear, however, the Eighth Circuit agrees with the court below that such claims are barred when they are based on asserted side agreements. *Hanson* v. *FDIC*, 13 F.3d 1247, 1251-1252 (1994) ("actions sounding in tort but based upon unwritten or secret agreements between the parties are barred"); *Oliver* v. *RTC*, 955 F.2d 583, 586 (1992). Both *Hanson* and *Oliver*, like the decision below (Pet. App. A7), rely in that regard on the First Circuit's prior decision in *Timberland Design* v. *First Service Bank for Sav.*, 932 F.2d 46 (1991). There is accordingly no conflict as to the legal analysis applicable to claims such as that advanced here by petitioners: so long as they arise from "unwritten or secret agreements," real or alleged, between the parties, they are barred under 12 U.S.C. 1823(e) and *D'Oench, Duhme*.

Similarly, in *Garrett* v. *Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 595 (1991), the Fifth Circuit held that "neither section 1823(e) nor the *D'Oench, Duhme* doctrine prevents plaintiffs from asserting affirmative claims or defenses *that do not depend on agreements*," but at the same time made clear that "if a claim is based on an agreement, that agreement must meet the requirements of section 1823(e)" (emphasis added). *Garrett* arose in the context of a motion to dismiss, and the court concluded that the pleadings on their face did not indicate that the plaintiffs' claims were "necessarily" barred, because it was not clear that those claims could only be based on the

agreements underlying the plaintiffs' loan. *Ibid.* Nothing in that holding, which returned the case to the district court for further consideration of whether the plaintiffs' claims were barred, conflicts with the analysis or holding of the court of appeals in this case.[6]

Finally, petitioners cite (Pet. 13) *Vernon* v. *FDIC*, 981 F.2d 1230 (11th Cir. 1993). *Vernon* and its predecessor, *Vernon* v. *RTC*, 907 F.2d 1101 (11th Cir. 1990), involved claims for securities fraud related to the stock of a failed thrift. In allowing those claims to go forward, the decisions focused on the fact that they did not relate to specific assets or banking transactions of the failed institution, and held that federal law did not bar "free standing tort claims that are not *related to a specific asset* acquired by the [federal insurer]." 981 F.2d at 1233-1234 (emphasis added); see 907 F.2d at 1107-1108. That limited holding was recently confirmed in *OPS Shopping Center, Inc.* v. *FDIC*, 992 F.2d 306, 310 (1993), in which the Eleventh Circuit declined to read *Vernon* expansively to exclude claims related to a specific banking transaction from the protection of Section 1823(e) and *D'Oench, Duhme* because the letter of credit involved created a liability, rather than an asset, of the failed bank. *OPS* distinguished (992 F.2d at 310-311) "free standing" claims involving employment discrimination, a car accident occurring in the scope of employment, or transactions in the institution's own stock (as in *Vernon*) from "claims which relate directly

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[6] The Fifth Circuit has held that claims similar to those in this case were barred under Section 1823(e) and *D'Oench, Duhme*. See, *e.g.*, *Clay* v. *FDIC*, 934 F.2d 69 (1991) (breach of fiduciary duty); *Beighley* v. *FDIC*, 868 F.2d 776, 784 & n.12 (1989) (fraud, breach of fiduciary duty, and promissory estoppel).

to regular banking transactions and which should be reflected in the records of regular banking transactions."

As noted above (see pages 7-8 & n.5, *supra*), petitioners' "consumer fraud" claim depends entirely on either the content of or the negotiations leading up to a particular loan transaction. Petitioner's characterization of their claim as a "free standing" tort claim within the meaning of *Vernon* and *OPS* is therefore incorrect. The court of appeals concluded instead (Pet. App. A7-A8) that petitioners' claim depended on proof of an agreement between petitioners and ComFed with respect to the terms of a routine real estate loan transaction. The decision below is therefore consistent with those of the Eleventh Circuit, and the court of appeals' resolution of the issue merits no further review.[7]

2. Petitioners argue perfunctorily (Pet. 16-17) that summary judgment based on the protections of 12 U.S.C. 1823(e) and *D'Oench, Duhme* was improper as to claims against ComFed Mortgage Company and ComFed Advisory Company, two wholly owned subsidiaries of the failed ComFed Savings. The lower courts have, however, uniformly extended those protections to wholly owned subsidiaries of failed depository institutions. See, *e.g.*,

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[7] The final footnote in the second *Vernon* opinion suggests the existence of a conflict among the courts of appeals on the issue of how closely a claim must relate to a "specific asset" of the failed institution before it will be barred under Section 1823(e) and *D'Oench, Duhme*. See 981 F.2d at 1234 n.8. *OPS*'s clarification (992 F.2d at 310) of the holding in *Vernon* limits the potential scope of any such conflict. In any event, as discussed in the text, the claims involved in this case involve an alleged unwritten agreement (an issue neither presented nor discussed in *Vernon*), and are closely related to a specific asset arising out of an ordinary banking transaction.

Oliver v. *RTC*, 955 F.2d 583, 585-586 (8th Cir. 1992); *Victor Hotel Corp.* v. *FCA Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991); *Astrup* v. *Midwest Federal Sav. Bank*, 886 F.2d at 1058-1059; *Glenborough New Mexico Assocs.* v. *RTC*, 802 F. Supp. 387, 394-395 (D.N.M. 1992); *Becherer* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 799 F. Supp. 755, 773 (E.D. Mich. 1992); see also *Sunchase Apts.* v. *Sunbelt Serv. Corp.*, 596 So. 2d 119, 126 (Fla. Dist. Ct. App. 1992). That result does not depend, as petitioners suggest (Pet. 17), on whether a federal agency has become a successor in interest to the subsidiary.[8] A wholly owned subsidiary is, instead, an "asset" of a failed institution, and in evaluating that asset as it appears on the books of the institution, banking authorities must be able to rely on the accuracy and completeness of the subsidiary's books and records as much as on those of the parent. The terms and purposes of Section 1823(e) (relating to agreements that tend to "diminish or defeat the interest of the [RTC] in any asset") and *D'Oench, Duhme* therefore apply equally to alleged agreements with subsidiaries of failed institutions.[9]

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[8] The RTC as receiver or conservator becomes the successor-in-interest to a failed depository institution as a matter of law. 12 U.S.C. 1821(d)(2) (Supp. IV 1992). The RTC does not generally become a successor in interest to subsidiaries of the failed institution, which continue to have a separate legal existence.

[9] Petitioners misstate the facts of *Victor Hotel Corp.* v. *FCA Mortgage Corp.*, *supra*. In *Victor Hotel* both the federal agency involved and, subsequently, a new bank created by the agency became successors in interest to the failed thrift. It is clear from the court's discussion (928 F.2d at 1083) that neither the agency nor the new bank became a direct successor in interest to the wholly owned subsidiary involved in the case. The court noted (*ibid.*) that protection against side agreements "extends to suc-

3. Finally, petitioners contend (Pet. 17-19) that the court of appeals erred in holding (Pet. App. A4-A6) that removal of this case to the District Court for the District of Massachusetts was proper under the general removal provisions of 28 U.S.C. 1441(a). Petitioners argue (Pet. 18-19) that the RTC was authorized to remove this case only under 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), and that under that provision, as in effect at the time of removal, the only permissible federal forum was the District Court for the District of Columbia.[10] The courts that have expressly addressed that argument have, however, rejected it, agreeing instead with the court below that the removal provisions of 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990) supplement, rather than replace, those of 28 U.S.C. 1441(a). See *Hellon & Assocs.* v. *Phoenix Resort Corp.*, 958 F.2d 295, 298 (9th Cir. 1992); *RTC* v. *Lightfoot*, 938 F.2d 65, 68 (7th Cir. 1991); *RTC* v. *Sloan*, 775 F. Supp. 326, 331 (E.D. Ark. 1991); *Montalvo Santiago* v. *RTC*, 779 F. Supp. 632, 636 (D.P.R. 1991).

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cessors in interest to the [federal agency]," and then held without qualification (*id.* at 1083-1084) that it extends also to subsidiaries of insured institutions, whether their stock is held by the federal agency itself or by the *agency's* successor in interest.

[10] Petitioners state (Pet. 18) that the court of appeals "agreed" that, under 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), venue was proper only in the District of Columbia. That court in fact only "grant[ed] *arguendo*" (Pet. App. A5) that venue in the District of Massachusetts was improper (and that the filing date for petitioners' otherwise untimely motion to remand should be equitably tolled), preferring to rest its judgment against peti-tioners on other grounds. Indeed, as the district court held (*id.* at C3-C5), petitioners' motion to remand for non-compliance with Section 1441a(*l*)(3) was untimely. That separate and prior ground for affirmance of the judgment below could make it unnecessary to reach the question presented by petitioners, and counsels against further review.

Petitioners contend (Pet. 18) that the decision in *RTC v. Westgate Partners, Ltd.*, 937 F.2d 526 (10th Cir. 1991), conflicts with the decisions of the other courts of appeals on this issue. *Westgate* held that 12 U.S.C. 1441a(*l*)(3) provided for removal only to the District Court for the District of Columbia. The *Westgate* court did not, however, consider the relationship between Section 1441a(*l*)(3) (Supp. II 1990) and 28 U.S.C. 1441(a), or consider whether removal might have been appropriate under the latter provision. Indeed, the *Westgate* court mentioned Section 1441(a) only to note that it "should not be confused" with the separate statute discussed in its decision. 937 F.2d at 528 n.3. *Westgate* thus did not address the provision on which the judgment below was based, and there is no conflict between the two decisions.

In any event, any conflict that might have existed as to the interpretation of 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990) has been resolved by Congress in favor of the interpretation adopted by the court below. Effective February 1, 1992, Section 1441a(*l*)(3) explicitly authorizes removal by the RTC "to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending." See Pet. 3. The question presented by petitioners is therefore of no continuing importance, and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 93-1782

In The

Supreme Court of the United States

October Term, 1993

RHETTA B. SWEENEY,
Individually and as Trustee of the
MAPLE LEAF TRUST and of the
CANADIAN REALTY TRUST, and JOHN SWEENEY,
Petitioners,

v.

RESOLUTION TRUST CORPORATION,
in its capacity as Receiver of
COMFED SAVINGS BANK,
COMFED MORTGAGE COMPANY, INC.,
COMFED ADVISORY COMPANY, INC.,
and DENNIS FUREY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

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11 pp

TABLE OF CONTENTS

		Page
Table of Authorities	. . . . .	ii
I.	The RTC Fails to Dispel The Conflict In The Circuits As To The Applicability Of *D'Oench Duhme*	2
II.	The RTC Fails To Dispel The Conflict In The Circuits As To The Permissible Venue Of Petitioners' Action Upon Its Removal By The RTC	7
Conclusion	. . . . .	9

TABLE OF AUTHORITIES

Cases	**Page(s)**
Astrup v. Midwest Federal Savings Bank, 886 F.2d 1057 (8th Cir. 1989)	2,3,4,5
Beighley v. FDIC, 868 F.2d 776 (5th Cir. 1989)	5
Clay v. FDIC, 934 F.2d 69 (5th Cir. 1991)	5
D'Oench, Duhme & Company, Inc. v. FDIC, 315 U.S. 447 (1942)	*passim*
Garrett v. Commonwealth Mortgage Corp. of America, 938 F.2d 591 (1991)	4,5
Hanson v. FDIC, 13 F.3d 1247 (1994)	4
In Re Geri Zahn, Inc., 25 F.3d 1539 (11th Cir. 1994)	7
Oliver v. RTC, 955 F.2d 583 (1992)	4
OPS Shopping Center, Inc. v. FDIC, 992 F.2d 306 (1993)	7
RTC v. Westgate Partners, Ltd., 537 F.2d 526 (10th Cir. 1991)	8
Vernon v. FDIC, 981 F.2d 1230 (11th Cir. 1993), *reh'g denied*, 990 F.2d 1270 (1992)	5,6,7
Vernon v. RTC, 907 F.2d 1101 (11th Cir. 1990)	5,6
Statutes	
12 C.F.R. § 545.32	3
12 U.S.C. § 1441a(1)(3)	8
12 U.S.C. § 1823(e)	2
28 U.S.C. § 1441(a)	8
28 U.S.C. § 1441(c)	8
Mass. Gen. L. Ch. 93A	4

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITIONERS' REPLY BRIEF

Petitioners Rhetta B. Sweeney, individually and as trustee of the Maple Leaf Trust and of the Canadian Realty Trust, and John Sweeney respectfully submit this reply brief in further support of their petition for a writ of certiorari and in reply to the brief in opposition by the respondent Resolution Trust Corporation (the "RTC").

I. The RTC Fails to Dispel The Conflict In The Circuits As To The Applicability Of *D'Oench Duhme*

Petitioners have previously demonstrated that the decision of the court of appeals below, in finding the *D'Oench Duhme* doctrine preclusive here, is in conflict with the prevailing law in at least three other circuits. The attempt by the RTC to reconcile these decisions simply glosses over their fundamentally different view of the applicability of the doctrine to tort claims, such as the statutory claim for deceptive practices at issue here.

Thus the fact remains that in *Astrup v. Midwest Federal Savings Bank*, 886 F.2d 1057 (8th Cir. 1989), the United States Court of Appeals for the Eighth Circuit found *D'Oench Duhme* inapplicable to an entirely analogous claim. There, as here, the plaintiff defaulted on a mortgage for the development of residential property units, and the lending S&L subsequently failed. Plaintiff contended that the bank had agreed to provide financing at below market rates, notwithstanding the notes and mortgage calling for interest at the market rate. The court of appeals affirmed the dismissal of the breach of contract claim, finding that *D'Oench Duhme* barred claims to enforce side agreements contradicting the terms of the bank's regularly kept business records — but the court also affirmed the award to plaintiff on the claim for breach of fiduciary duty in respect of misleading the plaintiff as to the applicable interest rates, finding that *D'Oench Duhme* afforded no protection against such tort claims.

Similarly, in the case at bar, petitioners have alleged a variety of deceptive practices in connection with their obtaining a mortgage from ComFed. The mortgage agreement itself remains enforceable by reason of *D'Oench Duhme*, absent any other written agreements satisfying the criteria of § 1823(e), but that does not mean that related claims for deceptive practices are necessarily disallowed. The RTC urges that those tort claims

must be "wholly independent of any agreement" with the bank or unrelated to its regular banking transactions (RTC Br. at 6), but plainly that was not the case in *Astrup*. The tort claim which was sustained there was part and parcel of the mortgage transaction. The Court of Appeals in *Astrup* determined (at 886 F.2d 1059) that:

> *[The D'Oench Duhme] doctrine affords no protection against tort claims against a financial institution*, whether for personal injuries to a motorist in a collision with an armored car bringing money to the S&L office, or for insider profits in a sale of securities violating Securities and Exchange regulations, or *for fraudulently entering into transactions involving discriminatory interest rates, such as the agreements alleged by plaintiffs in the case at bar.* (Emphasis added).

As petitioners have pointed out (Pet. Br. 9-10), the various deceptive practices they have alleged do not turn on the existence of any side agreement; indeed some are evident from the face of the recorded mortgage documents themselves. Pet. Br. at 11 n.1.[1] *Astrup* suggests that *D'Oench Duhme* would not bar petitioners' claim for deceptive practices even if they did depend

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1 The RTC asserts (RTC Br. at 8) that the First Circuit determined that petitioners' claim was premised on an unwritten agreement. In fact, the court pointed out the contrary, that petitioners' statutory claim for deceptive practices asserted that the closing documents themselves were misleading and unconscionable. A7-8. The court found the documents themselves insufficient to establish an "obligation" on the part of ComFed which would meet the requirements of *D'Oench* (A8), but the petitioners' statutory claim did not require a showing of contractual obligation, only a showing of deceptive practices.

Among these deceptive practices was ComFed's violation of 12 C.F.R. § 545.32. A8, F2, 9. This too was evident from the face of the bank's records. Contrary to the conclusion of the court (*see* RTC Br. at 6, n.4), petitioners maintain that ComFed's deceptive representations about compliance with the

on an alleged side agreement — but at the very least, *Astrup* makes clear that, contrary to the RTC's position here, the claim need not be wholly unrelated to a mortgage transaction.[2]

Likewise, the RTC has failed to show that the law in the Fifth Circuit can be reconciled with the decision below here. As petitioners previously demonstrated (Pet. Br. at 12), in *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591 (1991), the United States Court of Appeals for the Fifth Circuit found *D'Oench Duhme* inapplicable to claims under a state's deceptive practices statute arising from a loan transaction with a failed bank where the claim did not necessarily depend on the finding of an actual agreement between the parties. *Id.* at 594. As here, the claim obviously related to a loan agreement and related to the bank's ordinary business — thereby dispelling the RTC's postulate for reconciling the various cases — but the

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loan-to-value limitations in 12 C.F.R. § 545.32 and its failure in fact to comply with those limitations constitutes a deceptive practice as well under Mass. Gen. L. Ch. 93A.

Furthermore, insofar as petitioners' claim for deceptive practices included unwritten representations and misconduct by the bank, in addition to what was reflected in the agreements themselves, *Astrup* does not suggest that that is a critical distinction for purposes of sustaining a tort claim, as distinct from a contract claim.

2 The RTC suggests that the law in the Eighth Circuit in this respect was somehow altered by subsequent decisions. RTC Br. at 9. In fact, however, in *Hanson v. FDIC*, 13 F.3d 1247 (1994), as in *Astrup*, the court found that *D'Oench Duhme* did *not* bar plaintiff's tort claims relating to his loan agreements with the failed bank, because, as here, although the claims all related to the loan agreements they did "not necessarily arise from any agreement." *Id.* at 1252 n.10. In *Oliver v. RTC*, 955 F.2d 583 (1992), the Eighth Circuit dismissed plaintiff's claim for breach of fiduciary duty, pursuant to *D'Oench Duhme*, but only to the extent that it was based on an asserted side agreement. *Id.* at 586. Insofar as the claim, as here, did not require the finding of an agreement, *D'Oench Duhme* did not apply, and the claim was found insufficient only because the allegations did not support a finding of a fiduciary relationship. *Id.*

claim did not necessarily turn on the finding of any agreement, only the finding of deceptive acts and practices.

The RTC points to two Fifth Circuit cases *preceding Garrett* for the proposition that "claims similar to those in this case were barred under Section 1823(e) and *D'Oench Duhme*" (RTC Br. at 10 n.6), but neither case is in fact similar. In *Clay v. FDIC*, 934 F.2d 69 (5th Cir. 1991), the court affirmed dismissal of a negligence claim and a claim for breach of fiduciary duty, because (i) the negligence claim failed as a matter of state law, and (ii) the guaranty contract underlying the claim expressly absolved the bank of any fiduciary duty. In *Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989), the court affirmed dismissal of claims for, *inter alia*, fraud and breach of fiduciary duty, based on *D'Oench Duhme*, but again the decision turned on the claims' dependence on finding an actual collateral agreement rather than, as here, merely the bank's engagement in deceptive practices. Insofar as the RTC urges any further implications from *Beighley*, they would appear undermined by the subsequent decision of the Fifth Circuit in *Garrett*.

Finally, the division among the circuits on this issue was most clearly acknowledged by the United States Court of Appeals for the Eleventh Circuit in the companion cases of *Vernon v. RTC*, 907 F.2d 1101 (11th Cir. 1990) ("*Vernon* I"), and *Vernon v. FDIC*, 981 F.2d 1230 (11th Cir. 1993), *reh'g denied*, 990 F.2d 1270 (1992) ("*Vernon* II") (Pet. Mem. at 13). In *Vernon* I, the court, citing *Astrup* with approval, *id.* at 1106 n.3, 1108 n.7, found *D'Oench Duhme* inapplicable to claims of securities fraud by investors in a defunct S&L. The court observed (at 1107) that in virtually all cases where the doctrine has been applied, the party resisting *D'Oench Duhme* was attempting to avoid the enforceability of a mortgage or other monetary obligation owed to the bank. That was not the case in *Vernon* I and is not the case here, where the claim in issue does not seek to set aside the mortgage or reduce petitioners'

obligation thereunder but rather seeks affirmative compensatory relief for deceptive practices. *Vernon* I recognized that as an important distinction:

> [The RTC] would have us extend the *D'Oench* doctrine to preserve all assets, whether actually possessed or receivable, acquired by a federal insurer or its successor in interest from all claims tending to diminish those assets, save those claims clearly supported by the records of the insolvent bank .... We decline to adopt such a rule, however .... Certain claims, such as tort claims, might not appear in the books of a failed bank and yet easily be shown to be valid.

Id. at 1108.

The RTC suggests (RTC Br. at 10) that *Vernon* I is somehow a "limited holding" which does not demonstrate any actual division in the circuits, but any doubt about that was erased in the *Vernon* II decision where, as the RTC acknowledges (RTC Br. at 11 n.7), the court explicitly recognized the conflict among the circuits as to the applicability of *D'Oench Duhme* to tort claims. The court stated (at 1234 n.8):

> We acknowledge there are courts that disagree with our limitation of the doctrine; and perhaps the Supreme Court or Congress will shed light on the intended scope of the *D'Oench* decision in the near future. *See Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990) (an alleged unwritten side agreement need not implicate a specific obligation held by the FDIC); *Timberland Design v. First Service Bank for Sav.*, 932 F.2d 46, 50 & n.4 (1st Cir. 1991) (rejecting the analysis in *Astrup v. Midwest Fed Sav. Bank*, 886 F.2d 1057, 1059 (8th Cir. 1989) that *D'Oench* affords no protection against tort claims); *First State Bank v. City and County Bank*, 872 F.2d 707, 716-17 (6th Cir. 1989) (refusing to limit the *D'Oench* rule to situations

involving the collection of assets and holding the *D'Oench* doctrine to preclude the enforcement of an oral agreement which impacts on the failed institution's liabilities).

Thus, the Eleventh Circuit has expressly pointed out the conflict between the prevailing view on *D'Oench Duhme* in the First Circuit, upon which the decision hereinbelow was predicated, and the views of the Eighth Circuit and the Eleventh Circuit itself.[3] This Court is respectfully urged to respond to the suggestion of the Eleventh Circuit in *Vernon* II and resolve that conflict.

II. The RTC Fails To Dispel The Conflict In The Circuits As To The Permissible Venue Of Petitioners' Action Upon Its Removal By The RTC

Petitioners previously demonstrated that in holding this action was properly removed to the district court for the District of Massachusetts, the court of appeals ruled contrary to the law in the Tenth Circuit and contrary to the plain language of FIRREA. In arguing otherwise, the RTC has misconstrued the ruling below and the related authorities in several key respects.

First, the RTC erroneously concludes that the court of appeals did not resolve whether venue in the District of Massachusetts would have been permissible under FIRREA as it applied at the time of removal. RTC Br. at 13 n.10. In fact, the court not only assumed "arguendo" that such venue would have been improper under FIRREA (as the RTC concedes) but

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3 The RTC contends that after *Vernon* II the "scope of any such conflict," as perceived by the Eleventh Circuit, was "limited" in *OPS Shopping Center, Inc. v. FDIC*, 992 F.2d 306 (1993) (RTC Br. at 10-11, n.7), but, if anything, *OPS* serves only to underscore the confusion about *D'Oench Duhme*. *See also In Re Geri Zahn, Inc.*, 25 F.3d 1539 (11th Cir. 1994). Significantly, too, *OPS* involved a claim against the FDIC to enforce an unrecorded letter of credit; it did not involve claims for deceptive practices or other torts in which enforcement of the bank obligation is not in issue.

expressly determined so. A4-5 n.3. And it did so because no other conclusion could possibly be reached from the face of § 1441a(1)(3) prior to its 1992 amendment. The only issue for the First Circuit was whether FIRREA's removal provision controlled exclusively.

Secondly, as to the court's ruling that FIRREA's removal provision did *not* control, the RTC erroneously determined that the Tenth Circuit did not consider and reject the possible applicability instead of the general venue provision in 28 U.S.C. § 1441(a). In fact, however, the Tenth Circuit affirmed that, as the law existed in 1991, FIRREA's removal provision was "the applicable removal statute" for RTC substitution cases. *RTC v. Westgate Partners, Ltd.*, 537 F.2d 526, 527 (10th Cir. 1991). The court determined that FIRREA's removal provision was "the relevant statutory provision," *id.*, and expressly distinguished it from § 1441(a), "which deals with removal in general." *Id.* at 528.

Third, the RTC mistakenly asserts that it is the petitioners who urged that FIRREA governs the removal here. RTC Br. at 13. In fact, it was the RTC which invoked the FIRREA removal provision at the time it removed the case. Pet. Br. at 17-18, C3, I1-2. It is only now that FIRREA does not suit them that the RTC disavows the applicability of its removal provision.

Fourth, the RTC erroneously argues that untimeliness could be a separate ground for affirmance making it "unnecessary to reach the question presented by petitioners" (RTC Br. at 13 n.10), *i.e.*, whether FIRREA governs the removal of such cases exclusively. In fact, however, as petitioners previously demonstrated (Pet. Br. at 19-20), if FIRREA, rather than the general venue provision, does govern, the basis under which the district court found the motion to remand untimely, *i.e.*, its non-compliance with the requirement of § 1441(c), would be mooted.

Finally, the RTC illogically suggests that the ruling of the court below was validated by the 1992 amendment to the FIRREA removal provision allowing for removal to the district court where the state action is pending. RTC Br. at 14. Of course, though, the fact that the law was changed to allow for the result now urged by the RTC only confirms that that was not the law previously and that removal to the district court in Massachusetts in 1991 was therefore improper.

Conclusion

For the foregoing reasons, as well as those previously presented in the petition, the petition for certiorari should be granted.

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Respectfully submitted,

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